(1)

No. 84-755-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Rosa Elvira Montoya De Hernandez

Docketed:
November 8, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Horstman, Peter M.

Entry	Date	Note	Proceedings and Orders
1	Sep 28 1984		Application for extension of time to file petition and order granting same until November 8, 1984 (Rehnquist, October 3, 1984).
2	Nov 8 1984	G	Petition for writ of certiorari filed.
4	Nov 21 1984		Order extending time to file response to petition until January 10, 1985.
5	Jan 2 1985		DISTRIBUTED. January 18, 1985
6	Jan 5 1985	X	Brief of respondent De Hernandez, Rosa E. M. in opposition filed.
7	Jan 5 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	Jan 21 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED. Justice Powell OUT.
9	Jan 21 1985		Petition GRANTED. Justice Powell OUT.
			**********
10	Feb 4 1985	G	Motion of respondent for appointment of counsel filed.
11	Feb 8 1985		DISTRIBUTED. Feb. 15, 1985. (Motion for appointment of counsel).
12	Feb 11 1985		Record filed.
13	Feb 11 1985		Certified copy of original record & C.A. proceedings, 3 volumes, received.
14	Feb 19 1985		Motion for appointment of counsel GRANTED and it is ordered that Peter M. Horstman, Esquire, of Los Angeles, California, is appointed to serve as counsel for the respondent in this case. Justice Powell OUT.
15	Feb 25 1985		Exhibit # 102 received.
16	Mar 5 1985		Joint appendix filed.
17	Mar 8 1985		Brief of petitioner United States filed.
18	Mar 20 1985		Application for leave to file respondent's brief on the merits in excess of the page limitation filed (A-713),
19	Mar 20 1985		and order denying same by Rehnquist, J., on March 21, 1985.
20	Mar 25 1985		SET FOR ARGUMENT, Wednesday, April 24, 1985. (1st case).
21	Mar 28 1985		Brief of respondent Rosa E. M. de Hernandez filed.
22	Apr 1 1985		CIRCULATED.
23	Apr 12 1985	X	Reply brief of petitioner United States filed.
24	Apr 24 1985		ARGUED.

84-755 (1)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether respondent, who was reasonably suspected of attempting to smuggle contraband drugs carried within her body and who refused to submit to an X-ray, could lawfully be detained at the border by Customs officers for the period of time necessary to examine her bowel movements.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 731 F.2d 1369. The district court's oral ruling denying respondent's suppression motion (App., *infra*, 13a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1984. A petition for rehearing was denied on August 10, 1984 (App., *infra*, 15a). Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Central District of California, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and unlawful importation of cocaine, in violation of 21 U.S.C. 952(a) and 960(a)(1). She was sentenced to concurrent terms of two years' imprisonment, to be followed by a three-year special parole term. A divided panel of the court of appeals reversed respondent's convictions (App., *infra*, 1a-12a).

1. The evidence, which is summarized in the opinion of the court of appeals (App., *infra*, 2a-4a), showed that shortly after midnight on March 5, 1983, respondent arrived at the Los Angeles airport on a flight from Bogota, Colombia. After passing through an immigration checkpoint she proceeded to a Customs inspection area where, following a review of her travel documents, she was directed to a secondary inspection area for a more thorough examination. There, Customs Inspector Jose Serrato reviewed respondent's passport, inspected her luggage, and questioned her about her trip to the United States. Based on the information gleaned from this examination, Serrato suspected that respondent was carrying drugs internally because she exhibited characteristics common to persons who smuggle drugs concealed in their alimentary canals. App., *infra*, 2a & n.2.

Serrato's suspicion rested on the following facts: respondent came from a source country for narcotics, had previously made numerous trips of short duration to the United States, had paid cash for her ticket, carried little extra clothing or toiletries, had no confirmed hotel reservations, had no family or friends in the United States, and spoke no English. In addition, although respondent claimed that she had come to the United States to purchase clothing and other merchandise for her husband's business in Colombia, she acknowledged

that she had made no appointments to visit potential sellers but intended to take a taxi to various retail stores and to buy the merchandise on the spot (E.R. 93-94, 123-124).[1]

Inspector Serrato arranged for a female Customs officer to conduct a patdown search of respondent. The search failed to produce any evidence of contraband. The Customs officers then asked respondent whether she would consent to an X-ray of her abdominal cavity. Although she initially stated that she would consent, she withdrew her consent when informed that she would be handcuffed while en route to the hospital for the X-ray. App., *infra*, 3a.

The officers on duty at the airport then requested Customs Special Agent Kyle E. Windes to seek a court order for a body cavity X-ray. Windes declined to do so at that time and instead directed that respondent be afforded the options of consenting to an X-ray, remaining in custody until she had a bowel movement, or returning to Colombia on the next available flight. App., *infra*, 3a; E.R. 77, 86, 124; Tr. 29-30. Given these choices, respondent agreed to return to Colombia. The officers advised her, however, that she would be kept under observation until her departure and that, if she excreted any narcotics during that period, she would be arrested (E.R. 86, 125).

While respondent waited to be placed on a return flight to Colombia, she was detained in a room at the airport.[2] Customs officers instructed respondent that if

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[1] "E.R." refers to the excerpt of record in the court of appeals.

[2] As it happened, the next direct flight to Colombia was many hours away (E.R. 86; Tr. 24-25). During the course of respondent's subsequent detention, however, Customs officers attempted to arrange for her departure for Mexico City, where it was believed she could catch a connecting flight to Colombia. These arrangements were thwarted by poor weather conditions, and by the discovery that respondent did not have a visa for

she had to eliminate body wastes, she would be escorted to a nearby restroom, where she would have to use an empty wastebasket; the reason for this procedure was to prevent respondent from flushing contraband down the toilet. Under the continuous observation of Customs officers, respondent remained in the room throughout the night and most the next day, refusing to eat, drink, or empty her bowels; for most of this period, respondent sat curled up in a chair, leaning to one side or another. App., *infra*, 3a-4a; E.R. 89, 93, 100, 125; Tr. 24, 26, 36.

At approximately 3:00 p.m. on March 5, female officers subjected respondent to a second strip search, which again failed to reveal evidence of contraband (App., *infra*, 3a; E.R. 95). An hour later, Agent Windes arrived at the airport and, after consulting with the Customs officers on the scene and with an Assistant United States Attorney, decided to seek a court order authorizing an X-ray and an internal body cavity search. Agent Windes's affidavit in support of the court order summarized the Customs officers' observations with respect to respondent, including her refusal of food, drink, or use of toilet facilities over a 16-hour period.[3] At about midnight, a federal magistrate issued the requested order. App., *infra*, 3a-4a; E.R. 78-79, 80-83.[4]

Mexico and thus could not wait there until the next connecting flight to Colombia. E.R. 95-96, 99.

[3] The affidavit also noted that respondent's "relative lack of toilet articles, her light luggage, and her money being in $50 bills indicate a 'stripped down' or 'clean' approach typical of professional couriers" (E.R. 81).

[4] Because respondent claimed that she was pregnant, the court order provided that "[t]he X-ray and body cavity search is to be conducted only after a medical doctor has approved the use of the X-ray and body cavity search as appropriate for the [respondent] and only after the doctor has considered the [respondent's] claim that she is pregnant" (E.R. 83).

At 12:30 a.m. on March 6, 1983, respondent was taken to the University of Southern California Medical Center, where a rectal examination revealed a balloon containing cocaine.[5] Respondent was then placed under arrest and taken to a room in the prison ward of the hospital. Over the next four days, she excreted 88 balloons containing 528.4 grams of cocaine. App., *infra*, 4a; E.R. 126.

2. Prior to trial, respondent moved to suppress the cocaine (E.R. 15-27). She argued, inter alia, that the affidavit supporting the court order for the body cavity search was tainted by information obtained during an unlawful detention (E.R. 20-23).

The district court denied the motion (App., *infra*, 13a-14a). The court noted that, because the court order was based on information gleaned during the course of respondent's detention, the validity of the court order turned on the validity of the detention. In this regard, the court pointed out that, after they initially questioned respondent, the Customs officers had "a very substantial suspicion" that she was smuggling narcotics concealed inside her body (*id.* at 14a). On this basis, the court concluded that the officers were justified in seeking respondent's consent to an X-ray examination and, upon her refusal to consent, in detaining her until she either could be placed aboard a return flight to Colombia or had a bowel movement that would confirm or negate the officers' suspicions *(ibid.)*.

3. A divided panel of the court of appeals reversed (App., *infra*, 1a-12a). The court did not question the sufficiency of the information supporting the court order authorizing a body cavity search of respondent. It held, however, that the information underlying the court order, which included observation of respondent's suspicious behavior while detained, was the fruit of an unlawful detention of respondent, and that the cocaine

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[5] A previously administered test disclosed that respondent was not pregnant (E.R. 90, 126).

therefore should have been suppressed. The majority acknowledged that the Customs officers "had limited options in the face of their strong belief that [respondent] was a drug courier. They could let her into the country and try to follow her; they could seek a court order for an X-ray without undue delay; or they could detain her until nature took its course" (*id.* at 6a). In concluding that the officers' choice of the latter option was unreasonable, the majority noted that, under its recent decision in *United States* v. *Quintero-Castro*, 705 F.2d 1099 (1983), at the time the officers decided to detain respondent they lacked the necessary level of suspicion—a "clear indication" that she was engaged in alimentary canal smuggling—to obtain a court order for an X-ray search (App., *infra*, 6a). In these circumstances, the majority reasoned that the facts known to the officers likewise did not justify the lengthy period of detention, which the officers knew would result in "many hours of humiliating discomfort," for the purpose of examining respondent's bowel movements (*ibid.*).

Judge Jameson dissented (App., *infra*, 8a-12a). He noted at the outset that respondent did not, in fact, move her bowels under the observation of Customs officers, and that even though respondent "may have suffered 'many hours of humiliating discomfort,' she was herself solely responsible for a considerable part of it" (*id.* at 9a). In addition, Judge Jameson concluded that he "would permit reasonable detentions at the border for the purpose of observing persons suspected of alimentary canal smuggling so long as the detention is based on real suspicion sufficient to justify a strip search" (*id.* at 11a).[6] He reasoned that performance of

[6] In *United States* v. *Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970), the court of appeals defined "real suspicion" sufficient to justify a strip search at the border as "subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law."

peristaltic functions under observation of a Customs official is not significantly more intrusive than a strip search, as it involves merely passive visual inspection of bodily waste products, and that it is less intrusive than either a body cavity or an X-ray search, as to which the court had imposed the more rigorous "clear indication" standard. Addressing the reasonableness of detaining persons reasonably suspected of smuggling narcotics in their bodies, Judge Jameson observed that "indications of alimentary canal smuggling can only be observed *over a period of time*. Allowing a reasonable period of detention, based on a real suspicion, is the least intrusive and most reliable means of identifying alimentary canal smugglers" (*id.* at 10a-11a; emphasis in original; footnote omitted).[7] Finally, he noted that "[t]o deny the validity of reasonable detentions would reward the increasing ingenuity of narcotics smugglers and seriously hamstring the good faith efforts of customs officials to stem the flow of illegal narcotics across our border" (*id.* at 12a).

REASONS FOR GRANTING THE PETITION

Cases involving searches or seizures of persons stopped at the border who are suspected by Customs officers of attempting to smuggle narcotics ingested into their bodies[8] raise a number of important and

[7] Judge Jameson noted that, "[a]s a practical matter * * * a detention would not be necessary if customs officials could seek a court order for an X-ray on the basis of 'real suspicion'" (App., *infra*, 11a n.3). He noted, however, that the court of appeals had "adopted the higher 'clear indication' standard for X-ray searches" and that, although "the wisdom of this decision may be questioned, * * * it is the law of the circuit" (*ibid.*).

[8] As explained in *United States* v. *Couch*, 688 F.2d 599, 605 (9th Cir. 1982), alimentary canal smuggling involves the taking of a laxative to clean out the smuggler's digestive system, swallowing narcotics placed inside capsules or balloons, and finally taking drugs to inhibit digestion during the trip. Once the smug-

recurring questions of Fourth Amendment law. One of these questions—presented here—concerns the permissibility of detaining a suspect who refuses to submit to an X-ray search for the period of time necessary to examine his bowel movements for evidence of contraband. The decision of the court of appeals in this case, holding that such detentions at the border are unlawful unless supported by a "clear indication" that the suspect is carrying drugs internally, is in direct conflict with the decision of the Eleventh Circuit in *United States* v. *Mosquera-Ramirez*, 729 F.2d 1352 (1984). We believe that review by this Court is warranted to resolve this conflict and provide a single, nationwide standard for determining the reasonableness of detentions at the border of persons suspected of attempting to smuggle narcotics concealed inside their bodies.

1. In *United States* v. *Quintero-Castro*, 705 F.2d 1099 (9th Cir. 1983), the court of appeals held that an X-ray search at the border for the purpose of detecting body cavity smuggling is comparable in intrusiveness to a body cavity search, and that a "clear indication or plain suggestion"[9] that the suspect is carrying contra-

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gler reaches his destination, he takes another laxative to retrieve the contraband.

[9] The Ninth Circuit first articulated the "clear indication or plain suggestion" standard in upholding a body cavity search at the border in *Rivas* v. *United States*, 368 F.2d 703, 710 (1966), cert. denied, 386 U.S. 945 (1967). The court subsequently has explained that a "'[c]lear indication' means more than real suspicion but less than probable cause." *United States* v. *Mendez-Jimenez*, 709 F.2d 1300, 1302 (9th Cir. 1983). But see 3 W. LaFave, *Search and Seizure* §10.5, at 286-287 (1978).

The "clear indication" standard has its origins in *Schmerber* v. *California*, 384 U.S. 757 (1966). In *Schmerber*, where the defendant had been lawfully arrested for driving while intoxicated, the Court rejected the notion that extraction of a blood sample from the defendant's body could be upheld as a search

band in his body cavity is necessary in order to justify such procedures under the Fourth Amendment. See also *United States* v. *Couch*, 688 F.2d 597, 604-605 (9th Cir. 1982); *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982); *United States* v. *Aman*, 624 F.2d 911, 912-913 (9th Cir. 1980). In the instant case, the court of appeals held (App., *infra*, 6a) that if the information known to the Customs officers is insufficient to justify an X-ray search of a suspected smuggler under the "clear indication" standard adopted in *Quintero-Castro*, it likewise is insufficient to justify the suspect's detention for the period of time necessary to examine his bowel movements for evidence of contraband.

On the other hand, the Fifth and Eleventh Circuits have both held that an X-ray search at the border of a suspect's abdominal cavity is permissible if supported by a reasonable suspicion that the suspect is engaged in smuggling activity. *United States* v. *Mejia*, 720 F.2d

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incident to arrest, without any further justification. The Court explained (384 U.S. at 769-770):

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any * * * intrusions [beyond the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Because the facts establishing probable cause to arrest also suggested the relevance and likely success of a test of the defendant's blood for alcohol, the Court held that the "clear indication" test had been met. *Id.* at 770.

We think it may fairly be assumed that *Schmerber* employed the "clear indication" standard as a synonym for probable cause. Of course, we do not dispute that, outside of the border context, a detention of the sort involved in this case would likewise require probable cause.

1378, 1382 (5th Cir. 1983); *United States* v. *Vega-Barvo*, 729 F.2d 1341 (11th Cir. 1984), petition for cert. pending, No. 84-5553.[10] The court in *Vega-Barvo* (729 F.2d at 1350) expressly acknowledged that its holding was directly contrary to that of the Ninth Circuit in *Quintero-Castro*, but, in view of the fact that body cavity X-rays performed by hospital personnel do not involve physical contact, exposure of intimate body parts, or use of force, and in the absence of a generalized showing that routine abdominal X-rays pose a significant health risk, the court concluded that "it would be inappropriate to impose stringent Fourth Amendment constraints on their use in border searches" (729 F.2d at 1348).

Furthermore, in *United States* v. *Mosquera-Ramirez*, 729 F.2d at 1357, the Eleventh Circuit held that "[t]he detention of persons at the border long enough to reveal by natural processes that which would be disclosed by a more expeditious X-ray search cannot be held to be an unreasonable seizure. Nor can the search of the results of that natural process be held to be an unreasonable search." Accord, *United States* v. *De Montoya*, 729 F.2d 1369, 1371 (11th Cir. 1984). In *Mosquera-Ramirez*, the defendant, suspected by Customs officers of carrying drugs internally, refused their request that he submit to an X-ray examination. The officers then took him to a hospital for the purpose of detaining him until he discharged the contents of his stomach. There, following a detention of approximately 12 hours, he excreted 95 condoms filled with cocaine. 729 F.2d at 1354-1355. In rejecting the defendant's argument that his detention was unreasonable under the Fourth Amendment, the court concluded (*id.* at 1356):

[10] Accord, *United States* v. *Castaneda-Castaneda*, 729 F.2d 1360, 1363 (11th Cir. 1984), petition for cert. pending, No. 84-5556; *United States* v. *Padilla*, 729 F.2d 1367, 1368 (11th Cir. 1984).

> The customs inspectors seized and detained [the defendant] on the basis of enough suspicion to justify a search of the contents of his stomach and intestinal tract. [The defendant] was then given the option of submitting to an x-ray, a relatively expeditious search method. He refused. The only way to restrict detention time at that point would have been to physically force an x-ray. The alternative, which the customs agents chose, was to hold the defendant until nature revealed what an x-ray would have shown. The defendant's refusal to agree to submit to an x-ray, which the agents could constitutionally perform, cannot convert the reasonable alternative search method of detention into a Fourth Amendment violation.

The decision of the Eleventh Circuit in *Mosquera-Ramirez* is thus squarely in conflict with the decision of the Ninth Circuit in this case.[11]

2. Moreover, the decision below is contrary to settled principles of Fourth Amendment law governing Customs searches and seizures at the border. As this Court explained in *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977), "[b]order searches, * * * from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended upon probable cause." Congress has given Customs officers broad authority to search and detain persons entering the United States from a foreign country. 19 U.S.C. 1582.[12] Although this authority is lim-

[11] The government apprised the court of appeals of the conflict in its petition for rehearing en banc (at 9-10). The court nonetheless denied the petition (App., *infra*, 15a-16a).

[12] 19 U.S.C. 1582 provides:

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized

ited by the reasonableness requirement of the Fourth Amendment (see *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 6), this Court has never addressed the question of how the reasonableness standard should be applied to searches and seizures of persons at the border.[13]

This case involves the detention of a suspected smuggler at the border for what concededly was a lengthy period of time. The reasonableness of that detention, however, is not subject to the same standards as the detention of a suspect in a non-border setting. The Eleventh Circuit in *Mosquera-Ramirez*, 729 F.2d at 1356 (citations omitted), focused on the differences between detentions at the border and those away from the border:

> Border searches exist in an entirely different context than *Terry*-type stops. Of primary significance is that at the border, searches are not subject to the probable cause and warrant requirement of the Fourth Amendment. The governmental interest and the individual's expectation of privacy are also different than those involved in the normal domestic *Terry*-type stop. As this Court has stated: "[t]he national interests in self-protection and protection of tariff revenue authorize a requirement that persons crossing the border

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to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

See 19 C.F.R. 162.6. Customs officers stationed at ports of entry throughout the United States operate under mandatory guidelines issued by the Commissioner of Customs.

[13] See *United States* v. *Ramsey*, 431 U.S. at 618 n.13, where the Court left open the question "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out."

> identify themselves and their belongings as entitled to enter and be subject to search." These different circumstances have produced a different result in the Fourth Amendment balancing process. At the border, a person may be detained long enough for the officials to determine they are entitled to enter the United States * * *. If the officials must determine that persons entitled to entry are not carrying contraband, they must be given time to make that determination using reasonable search methods.

Furthermore, as the court observed in *Mosquera-Ramirez*, 729 F.2d at 1356, "[c]onsideration of the reasonableness of the length of detention must focus on the purpose of detention in the first place. It would not seem unreasonable for government officials to detain a person for the period of time necessary to conduct a valid search." Cf. *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 10. Accordingly, we turn to examine the permissibility of the purpose for which respondent was detained—viz., to examine her bowel movements for evidence of contraband.

This Court has held that "'the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *United States* v. *Villamonte-Marquez*, slip op. 9 (quoting *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979)). See, *e.g.*, *United States* v. *Place*, slip op. 6-7; *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975). The courts of appeals have applied such a general reasonableness analysis to border searches when the intrusiveness of the search procedure has extended beyond a routine inspection of the person and his effects. As the court explained in *Vega-Barvo*, 729 F.2d at 1344, in the context of border searches the reasonableness analysis consists of "a flexible test which

adjusts the strength of suspicion required for a particular search to the intrusiveness of that search. As intrusiveness increases, the amount of suspicion necessary to justify the search correspondingly increases. This approach attempts to balance the privacy interests of the international traveler and the Government's interest in controlling the flow of contraband." See, *e.g.*, *United States* v. *Grotke*, 702 F.2d 49, 51 (2d Cir. 1983); *United States* v. *Ek*, 676 F.2d at 382; *United States* v. *Sandler*, 644 F.2d 1163, 1167-1169 (5th Cir. 1981) (en banc); *United States* v. *Dorsey*, 641 F.2d 1213, 1216-1217 (7th Cir. 1981); *United States* v. *Asbury*, 586 F.2d 973, 975-976 (2d Cir. 1978); *United States* v. *Wardlaw*, 576 F.2d 932, 934-935 (1st Cir. 1978).

Because "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the state" *(Schmerber* v. *California*, 384 U.S. 757, 767 (1966)), one focal point of this analysis is upon the extent of the indignity suffered by the individual searched. More specifically, this aspect may properly be said to involve an assessment of three factors "which contribute to the personal indignity endured by the person searched: (1) physical contact between the searcher and the person searched; (2) exposure of intimate body parts; and (3) use of force." *Vega-Barvo*, 729 F.2d at 1345-1346. In applying these factors in a border search setting, the courts have concluded that, although a patdown search or an inspection requiring removal of an outer garment is permitted on the basis of nothing more than a Customs officer's subjective belief that such measures are necessary (see, *e.g.*, *United States* v. *Sandler*, 644 F.2d at 1169), a strip search may not be undertaken without a "reasonable" or "real" suspicion that the individual is carrying contraband. See, *e.g.*, *United States* v. *Ek*, 676 F.2d at 382; *United States* v. *Sandler*, 644 F.2d at 1169; *United States* v. *Dorsey*, 641 F.2d at 1217; *United States* v. *Asbury*, 586 F.2d at 975-976. And the Ninth Circuit has held that, in order to justify a search of body cavities, the Customs officers must have information supplying a "clear indication or plain suggestion" that the suspect is carrying contraband within his body. See *United States* v. *Ek*, 676 F.2d at 382; *United States* v. *Aman*, 624 F.2d at 912-913.

The court of appeals erred in holding that the "clear indication" standard applicable to body cavity searches (which we do not here contest) had to be met in order to justify respondent's detention for the purpose of permitting Customs officers to inspect her bowel movements.[14] As Judge Jameson explained in his dissent below (App., *infra*, 9a; footnote omitted), although performing a bowel movement while under the observation of a Customs official "imposes upon an individual's dignity, * * * such an imposition does not differ significantly from a strip search. In both cases, the 'search' consists of passive visual inspection of the body's surface and, in this case, of its waste products." See, *e.g.*, *United States* v. *Himmelwright*, 551 F.2d 991, 995-996 (5th Cir.), cert. denied, 434 U.S. 902 (1977); *United States* v. *Holtz*, 479 F.2d 89, 93 (9th Cir. 1973).[15] Moreover, such searches involve a substantially lesser degree of humiliation than a body cavity search, such as a digital probe of the anus or vagina. Unlike those intrusive procedures, the "search" technique at issue here

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[14] We address the quantum of suspicion necessary to permit detention for the purpose of conducting an X-ray search of a suspect's body cavity in our response to the petition for certiorari in *Vega-Barvo* v. *United States*, No. 84-5553, a copy of which will be furnished to counsel for respondent.

[15] As Judge Jameson pointed out (App., *infra*, 9a n.2), "a valid strip search may involve a visual inspection of the anal region." See, *e.g.*, *United States* v. *Holtz*, 479 F.2d at 93 (collecting cases); *United States* v. *Sosa*, 469 F.2d 271, 273 (9th Cir. 1972), cert. denied, 410 U.S. 945 (1973).

involves no physical contact with the suspect, no involuntary invasions beyond the body's surface into "the most intimate portions of the [suspect's] anatomy" (*United States* v. *Cameron*, 538 F.2d 254, 258 (9th Cir. 1976)), and none of the physical discomfort that may result from the exploration of body cavities. In view of these significant distinctions, it was entirely inappropriate for the court of appeals to require, as a predicate for the observation of respondent's bowel movements, the same quantum of suspicion that the court requires for a body cavity search.[16]

Turning to the detention in this case, we submit that, in view of the government's vital interests in interdicting drug trafficking, it was perfectly reasonable for the Customs officers to detain respondent for the period of time necessary either to confirm or dispel the reasonable suspicion that she was carrying drugs internally. Because respondent was given the option of submitting to an X-ray or moving her bowels under observation, the duration of her detention rested largely

[16] The "clear indication" threshold imposed by the court of appeals for detaining suspected alimentary canal smugglers for the purpose of inspecting their bowel movements is not only disproportionate in relation to the nature and scope of the intrusion involved, it is impractical. As Judge Jameson noted (App., *infra*, 10a), this standard may be met with relative ease in cases involving smuggling by insertion of drugs into body openings, due to the appearance of telltale indicia, such as lubricant stains on undergarments, a suspect's unnaturally stiff and erect gait, restricted body movements, and possession of condoms and lubricants. In contrast, alimentary canal smuggling does not ordinarily leave such readily observable external signs. See *United States* v. *Mendez-Jimenez*, 709 F.2d at 1303. Consequently, imposition of the higher "clear indication" standard would, as in this case, almost invariably require the release into this country of persons believed to be engaged in alimentary canal smuggling notwithstanding the presence of a reasonable suspicion on the part of experienced Customs officials that the persons are carrying contraband inside their bodies.

within her control. As Judge Jameson observed in his dissent below (App., *infra*, 9a), although respondent "may have suffered 'many hours of humiliating discomfort' she was herself solely responsible for a considerable part of it." On the other hand, the government has a compelling interest in being able to detain a person such as respondent, who is reasonably suspected of alimentary canal smuggling and who refuses to submit to an X-ray search, for the period of time necessary to confirm or dispel that suspicion. As noted in the dissent (*id.* at 10a), because such smuggling techniques do not commonly leave the telltale external signs that identify other types of body cavity smuggling (see note 16, *supra*), the least intrusive method for confirming or dispelling suspicions of alimentary canal smuggling—a method substantially less intrusive than subjecting the suspect to an internal examination—is to place the suspect under observation for an extended period of time.[17] Given the inherent difficulties of detecting alimentary canal smuggling without extended detention, and the absence of feasible alternatives, it is reasonable to detain at the border persons reasonably suspected of carrying narcotics internally for the period of time necessary to examine their bowel movements.[18]

[17] Because the purpose of Customs inspections is to prevent contraband from being smuggled across our borders, it makes little sense to suggest, as did the majority below (App., *infra*, 6a), that the Customs officers could have "let [respondent] into the country and [tried] to follow her." Although the officers did offer respondent the option of taking the first available return flight to her country of origin, that alternative is also unsatisfactory because it would afford a suspected smuggler like respondent the opportunity to escape apprehension and repeat her smuggling activities another day, and would generally encourage this smuggling technique by materially reducing the risk of apprehension and prosecution.

[18] Even if some more rigorous standard than reasonable suspicion is applicable to extended detentions of suspected smug-

3. Resolution of the conflict between the decision below and that of the Eleventh Circuit in *Mosquera-Ramirez* is necessary both to clarify an important question of Fourth Amendment law governing border searches and to afford guidance to federal law enforcement authorities responsible for interdicting drugs at the national borders or their functional equivalents. As these cases illustrate, narcotics smugglers have become increasingly adept at concealing contraband destined for distribution within the United States. In particular, alimentary canal smuggling has become a problem of substantial dimensions both because of its increasing frequency[19] and the difficulty inherent in its detection (see note 16, *supra*).

The decision below, severely restricting the use of a foolproof and relatively unintrusive investigative measure, has resulted in the application of different rules governing Customs procedures in the Eleventh and Ninth Circuits. Thus, the decision virtually invites alimentary canal smugglers to shift their operations to ports of entry within the Ninth Circuit, where, due to the prevailing rule limiting the permissible actions of Customs officers, their smuggling activities are more likely to pass undetected. It therefore is important that

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glers, we submit that any such standard was met here, where the officers had "a very substantial suspicion" that respondent—an alien with no right to enter the United States—was smuggling narcotics concealed inside her body (App., *infra*, 14a), and where the "detention" consisted merely of waiting with respondent in a room until arrangements could be made for her departure.

[19] To illustrate the magnitude of the problem, we note that in *United States* v. *Mendez-Jimenez*, 709 F.2d at 1301, the court observed that a Customs officer apprehended 25 body cavity smugglers on a single flight. Moreover, the increasing number of reported appellate decisions involving alimentary canal smugglers is also indicative of the dimensions of the threat posed by this smuggling method.

this Court resolve the conflict among the circuits to apprise Customs officials throughout the country of the proper standards governing detentions at the border of suspected alimentary canal smugglers. As Judge Jameson observed in dissent (App., *infra*, 12a), "[t]o deny the validity of [such reasonable detentions] would reward the increasing ingenuity of narcotics smugglers and seriously hamstring the good faith efforts of customs officials to stem the flow of illegal narcotics across our borders."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1984

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-5125

Argued and Submitted Dec. 8, 1983
Decided April 24, 1984

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ,
DEFENDANT-APPELLANT

Before GOODWIN and TANG, *Circuit Judges*, and JAMESON, *District Judge*.*

PER CURIAM.

Rosa Montoya de Hernandez appeals her convictions for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and for importation of cocaine in violation of 21 U.S.C. §§ 952(a) and 960(a)(1). She argues that the district court erred in failing to suppress 88 bags of cocaine that passed through her alimentary canal after a lengthy airport detention following her arrival on a flight from Bogota, Colombia.

The question in this case is to locate that point on a continuum at which the level of well-founded suspicion on the part of the customs officers justifies the harsh choices which the officers may present to an incoming passenger. It is clear from the cases[1] that a fairly low

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*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

[1] A person entering the country is subject to routine searches without probable cause. *United States* v. *Ramsey*, 431 U.S. 606, 619, 97 S.Ct. 1972, 1980, 52 L.Ed.2d 617 (1977).

level of suspicion will permit a moderately intrusive search for contraband. It is equally clear from the cases[2] that the more intrusive and insulting the search, the greater must be the probability, based upon facts known before the search is made, that the search will indeed produce contraband. Bearing these general guidelines in mind, we examine the facts of this case.

Shortly after midnight on March 5, 1983, Ms. Montoya de Hernandez arrived in Los Angeles aboard a flight from Bogota, Colombia. She presented her passport and visa to immigration officials and proceeded to a customs line.

Customs officials reviewed her documents and directed her to a secondary area for a more thorough examination. There an Inspector Serrato reviewed de Hernandez's documents and questioned her regarding her trip to the United States. Serrato testified that he immediately suspected that de Hernandez was carrying drugs internally because she fit the common profile of an internal-body carrier.[3]

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[2] *Ramsey* notes that warrants are not required for border searches, but this circuit has indicated in dictum that while a warrant is not mandatory in body cavity searches, "the absence of a warrant is an important factor in assessing the reasonableness with which the authorities acted." *United States* v. *Cameron*, 538 F.2d 254, 259 (9th Cir.1976). Following *Cameron* we have had a number of published opinions and countless unpublished dispositions dealing with border searches made with and without warrants, and with or without some element of delay. *See, e.g., United States* v. *Couch*, 688 F.2d 599 (9th Cir.1982), and cases collected therein.

[3] De Hernandez had paid cash for her ticket, came from a source port of embarcation, carried $5,000 in U.S. currency, had made many trips of short duration into the United States, had no family or friends in the United States, had only one small piece of luggage, had no confirmed hotel reservations, did not speak English, and said she was planning to go shopping using taxis for transportation. Prior cases of body smugglers had taught the agents to regard these factors in various combinations as highly likely to identify a drug carrier. This particular suspect possessed almost all of the indicators.

Serrato had de Hernandez taken to another room for a pat down. That search failed to reveal evidence of contraband. The arriving passenger was then asked if she would consent to an x-ray search. She initially indicated that she would consent, but when she was told she would be taken to a hospital in handcuffs for the x-ray, she withdrew her consent. Officer Serrato's supervisors then contacted Special Agent Windes for the purpose of obtaining a court order for an x-ray search. *See United States* v. *Erwin*, 625 F.2d 838 (9th Cir. 1980).

Windes decided that the facts then known probably would not support a court ordered x-ray examination. At this time the arriving passenger had not yet been detained for an unusual period of time. Windes told Serrato and his supervisors to give the passenger three choices: She could either consent to an x-ray search, be held in custody until her bowels moved, or depart the United States on the next plane for Colombia. De Hernandez reluctantly consented to leave for Colombia, but the next flight could not be arranged for several more hours. She was therefore left with the "choice" of consenting to an x-ray or remaining in custody until her peristaltic functions produced a monitored bowel movement. She was taken to a room and held under the observation of Serrato and other inspectors for the remainder of the night and most of the next day, a total of some 16 hours.

A strip search after the 16-hour delay again failed to reveal contraband. Agent Windes decided to seek a court order for an x-ray and body cavity search. The application for the court order contained information gleaned during the 16-hour detention and observation of the passenger. This information include refusal of food and water and symptoms of discomfort suspected

to arise out of, or at least to be consistent with, heroic efforts to resist the usual calls of nature. At midnight the order was issued, nearly 24 hours after her plane had landed.

De Hernandez was taken to a hospital where a rectal examination revealed a balloon containing cocaine. She was given the *Miranda* warnings and taken to jail. During the next 4 days she passed 88 balloons containing cocaine.

"As a search becomes more intrusive, it must be justified by a correspondingly higher level of suspicion of wrongdoing." *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982) (citing *United States* v. *Aman*, 624 F.2d 911, 912-13 (9th Cir. 1980)). Therefore, a "real suspicion" that contraband is concealed on the body of the person to be searched is required for a strip search. *United States* v. *Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970). X-ray and body cavity searches are more intrusive than a strip search. Such searches require a "clear indication' or 'plain suggestion' that the person is carrying contraband within his body." *Ek*, 676 F.2d at 382 (citation omitted.) In this case, the officers had a strong suspicion that de Hernandez was carrying drugs in her body, but for more than 16 hours they did not apply for a court order. The officers decided, instead, to wait for nature to provide the stronger evidence that would support an order. This decision necessarily impacted both the comfort and the dignity of a human being.

The degree of suspicion necessary to justify a detention for the purpose of having a suspect produce a bowel movement has not been established. In *United States* v. *Couch*, 688 F.2d 599 (9th Cir. 1982), *cert. denied*, 459 U.S. 857, 103 S.Ct. 128, 74 L.Ed.2d 110 (1982), we affirmed the conviction. The customs officials in *Couch* had the usual indications of internal smuggling, plus an informant's tip. The suspect's detention

while a court order for an x-ray was sought was therefore reasonable. We did not then have to reach the issue whether the customs officials without a court order, could have detained the suspect on the same level of suspicion until his bodily processes had cleared his digestive tract of its contents. *Couch*, 688 F.2d at 603 n.5. In *Couch* we noted that such a detention could last two or three days. *Id.*

What circumstances justify the delay imposed in this case? These cases usually turn upon the sufficiency of the original evidence which establishes in the customs officer's mind the belief that the incoming passenger "fits the drug courier profile". If that evidence is strong, and where it is enhanced by a tip from a reliable informer, we have upheld lengthy delays and highly obtrusive searches. *See, e.g., Erwin, Couch, Ek,* and cases discussed therein. These cases suggest that when in doubt the customs officers should present their information to a magistrate and permit that judicial officer to exercise judicial discretion in striking the delicate balance between human rights and the practical necessities of border security.

In the case at bar, there was a justifiably high level of official skepticism about the woman's good faith as a tourist; but at the same time the officers knew that thousands of unusual looking persons cross international borders daily on all sorts of errands, many of which are wholly innocent. At the time the officers offered de Hernandez the alleged choice of taking the next plane back to Bogota (and remaining under observation during the wait), or submitting to a custodial x-ray examination, the officers knew that no plane would be leaving for Bogota for several more hours. The officers accordingly knew that the woman would suffer many hours of humiliating discomfort if she chose not to submit to the x-ray examination. Under the circumstances of this Hobson's choice, one can hardly

characterize as voluntary any decision on the part of de Hernandez to consent to wait under observation. Rather, the officers effectively decided that if she did not wish to submit to an x-ray examination, she could just wait until natural processes made that type of examination unnecessary, no matter how long that might be.

The officers themselves had limited options in the face of their strong belief that de Hernandez was a drug courier. They could let her into the country and try to follow her; they could seek a court order for an x-ray without undue delay; or they could detain her until nature took its course. They chose the latter. While there is some doubt about the humanity of the course the officers followed, it does have some support in the cases. *See, e.g., Erwin, supra.* However, following *Ek, supra,* this court decided *United States* v. *Quintero-Castro,* 705 F.2d 1099 (9th Cir. 1983). It is difficult to distinguish the facts known to the customs officers when they decided to detain de Hernandez from the facts known to the officers and transmitted to the magistrate in *Quintero-Castro.* In *Quintero-Castro* we held those facts to be insufficient to authorize the warrant for an x-ray search. Here, if the facts apparent upon arrival would not authorize the issuance of a warrant, it is difficult to hold that the same facts would authorize the long period of detention which eventually did produce some additional evidence in support of a warrant. Under the teaching of *Quintero-Castro,* if not compelled by the holding, the trial court should have suppressed the evidence in this case.

Contrary to the government's assertions, we find the result in *United States* v. *Mendez-Jimenez,* 709 F.2d 1300 (9th Cir. 1983), distinguishable from the present fact pattern. In *Mendez-Jimenez,* the court found that an x-ray search which revealed foreign objects in defendant's body was not conducted in violation of the

Fourth Amendment. *Id.* at 1304. We first noted that unlike the present case, the customs officers in *Mendez-Jimenez* petitioned the magistrate for a court order authorizing an x-ray examination as soon as their preliminary investigation was completed. Additionally, the evidence submitted to the magistrate in *Mendez-Jimenez* contained several factors supporting a finding of clear indication that did not exist in the present case: (1) defendant's possession of an anti-diarrhea medication, (2) evidence of nonconsumption of food or beverages before defendant was detained and during the preliminary investigation, and (3) evidence of passport tampering. Moreover, the decision by the customs officers in the present case not to seek a court order for an x-ray search was based in part on their belief that they did not have sufficient facts to support the issuance of the order. We find that, in the instant case, the evidence available to the customs officers when they decided to hold de Hernandez for continued observation was insufficient to support the 16-hour detention.

Reversed.

JAMESON, *District Judge*, dissenting:

I respectfully dissent.

The Fourth Amendment functions "to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber* v. *California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966). It is undisputed here that the initial strip search was not an unwarranted intrusion on de Hernandez's privacy and dignity. The sole question is whether the subsequent detention, with the possibility that she would produce a monitored bowel movement, thereafter became an unwarranted or unreasonable intrusion on her privacy and dignity. This question requires us to strike a delicate balance. I would strike the balance in favor of the Government.

I recognize that a close question is presented, particularly under *United States* v. *Quintero-Castro*, 705 F.2d 1099 (9th Cir. 1983). In my opinion, however, *Quintero-Castro* and the other cases cited in the majority opinion may be distinguished.[1] The opinion contains a fair summary of the facts. In addition, however, the following may be considered:

First, while the initial purpose of the detention was to "[have] a suspect produce a bowel movement," in fact no such bodily function occurred. Instead, the customs agents merely observed and occasionally questioned Ms. de Hernadez for a period of 16 hours. From their observations, they gained further evidence that, in the magistrate's view, gave a "clear indication" of alimentary canal smuggling. Consequently, the detention

[1] *Quintero-Castro* involved an X-ray rather than detention, and we expressly recognized that "X-ray and body cavity searches are the most intrusive," requiring a "'clear indication' or 'plain suggestion' that the person is carrying contraband within his body." A "real suspicion" is sufficient for a strip search. 705 F.2d at 1100.

was minimally intrusive, and though de Hernandez may have suffered "many hours of humiliating discomfort," she was herself solely resonsible for a considerable part of it.

Even if de Hernandez had performed her peristaltic functions under the observation of a customs official, I would hold that the detention did not thereby become significantly more intrusive than a strip search. Certainly, performing such bodily functions while under observation imposes on an individual's dignity, but such an imposition does not differ dramatically from a strip search.[2] In both cases the "search" consists of passive visual inspection of the body's surface and, in this case, of its waste products. On the other hand, we distinguish body cavity and X-ray searches precisely because they intrude "beyond the body's surface." *United States* v. *Aman*, 624 F.2d 911, 912 (9th Cir. 1980). We have noted that body cavity searches are sometimes painful and always invade "the most intimate portions of [the suspect's] anatomy," *United States* v. *Cameron*, 538 F.2d 254, 258 (9th Cir. 1976). Additionally, X-rays pose the potential for physical harm to the suspect. See *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982). The detention in this case did not contemplate an invasion beyond the body's surface nor did it require the same degree of humiliation attendant on such an invasion.

[2] A valid strip search may involve "a visual search of the anal region." *United States* v. *Sosa*, 469 F.2d 271, 273 (9th Cir. 1972), *cert. denied*, 410 U.S. 945, 93 S.Ct. 1399, 35 L.Ed.2d 612. We have also upheld a strip search in which the female suspect was asked "to turn around and bend over." *United States* v. *Shields*, 453 F.2d 1235, 1236-37 (9th Cir. 1972), *cert. denied*, 406 U.S. 910, 92 S.Ct. 1615, 31 L.Ed.2d 821, cf. *Henderson* v. *United States*, 390 F.2d 805 (9th Cir. 1967) (suspect made to "manually open her vagina for visual inspection" constituted body cavity search).

Second, this court recently recognized "that smuggling by ingestion into the alimentary canal does not leave the external signs that body cavity (e.g., rectum or vagina) smuggling does." *United States* v. *Mendez-Jimenez*, 709 F.2d 1300, 1303 (9th Cir. 1983) (Citation omitted). As a result, many of our prior decisions are simply not analogous to the present facts, particularly cases where we relied on the suspect's unnaturally stiff and erect gait, restricted body movements and possession of lubricants to demonstrate a clear indication of body cavity smuggling. See, *e.g.*, *United States* v. *Shreve*, 697 F.2d 873 (9th Cir. 1983); *United States* v. *Aman*, 624 F.2d 911.

It is clear tht narcotics smugglers have become increasingly adept at concealing contraband. Consequently, the indicia used by customs officials to identify smugglers have in some cases become more general and circumstantial. Alimentary canal smugglers, for example, prepare their bodies by first taking laxatives to clear their digestive tracts; they then swallow their valuable cargo of narcotics often in capsules or "balloons"; finally they take certain drugs to inhibit digestion and prevent diarrhea during their *usually brief* flight to the United States. Once they reach their destination, they take another laxative to retrieve the narcotics. See *United States* v. *Couch*, 688 F.2d 599, 600 (9th Cir. 1982). Beyond the usual "profile" of the narcotics smuggler, therefore, there are only a few consistently apparent and reliable indications that a person is smuggling narcotics in his alimentary canal. The two most common indications are the consistent refusal to eat or drink and the suspect's often Herculean efforts to stifle his natural peristaltic functions.

It must be stressed that the foregoing indications of alimentary canal smuggling can only be observed *over a period of time*. Allowing a reasonable period of detention, based on a real suspicion, is the least intrusive and

most reliable means of identifying alimentary canal smugglers.[3]

Third, it is well settled that we do not review evidence supporting a "real suspicion" or a "clear indication" of smuggling in light of our own experiences or those of a reasonable man:

> On the contrary, the question is whether an experienced customs officer ... after assessing the totality of the evidentiary factors and circumstances in the light of his own training and experience, would conclude that there was a clear indication that the defendant was engaged in internal body smuggling.

United States v. *Mendez-Jimenez*, 709 F.2d at 1302-03 (Citation omitted). It is undisputed in this case that the facts initially known by the customs officials justified a "real suspicion" that de Hernandez was carrying narcotics. The first strip search was valid in light of their real suspicion. Similarly, in determining whether the subsequent detention was valid, we must give due weight to the good faith, experienced assessment of the customs officials.

I would permit reasonable detentions at the border for the purpose of observing persons suspected of alimentary canal smuggling so long as the detention is based on a real suspicion sufficient to justify a strip search. In *United States* v. *Couch*, 688 F.2d 599, 603-04 (9th Cir. 1982), we held that an extended detention is valid if it is reasonably related to a valid search. We also pointed to the well established rule that '[g]ov-

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[3] As a practical matter, of course, a detention would not be necessary if customs officials could seek a court order for an X-ray on the basis of a "real suspicion." In *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982), however, we adopted the higher "clear indication" standard for X-ray searches. As the court recently observed, the wisdom of this decision may be questioned, but it is the law of the circuit. *United States* v. *Shreve*, 697 F.2d 873, 874 (9th Cir. 1983).

ernment agents are given considerably more leeway at the border." *Id.* at 602. Since the strip search was valid in this case and given the elusive nature of the smuggling suspected here, I think the detention was reasonably related to the initial search. See also *United States* v. *Ek*, 676 F.2d at 382; *United States* v. *Erwin*, 625 F.2d 838, 841 (9th Cir. 1980). Although the detention was perhaps longer than absolutely necessary, I do not think it was unreasonable. The additional evidence obtained during the observation period demonstrated a clear indication of alimentary canal smuggling.

To deny the validity of reasonable detentions would reward the increasing ingenuity of narcotics smugglers and seriously hamstring the good faith efforts of customs officials to stem the flow of illegal narcotics across our borders. Eighteen years ago, this court declared that its review of border searches must "be governed by the practical knowledge of the extent to which smugglers are willing to degrade their bodies in order to obtain the drugs they crave or the money they desire." *Rivas* v. *United States*, 368 F.2d 703, 710 (9th Cir. 1966). Nor can we ignore the generally improved treatment of smuggling suspects at the border,[4] the regularity with which customs officials now seek court orders and warrants, and the ready availability of relatively unintrusive X-ray procedures as an alternative to body cavity searches. These are all factors which must be considered "in striking the delicate balance between human rights and the practical necessities of border security." I would strike the balance here in favor of the Government.

I would affirm.

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[4] *Cf. United States* v. *Cameron*, 538 F.2d 254, 256-57 (9th Cir. 1976); *Blefare* v. *United States*, 362 F.2d 870 (9th Cir. 1966); *Blackford* v. *United States*, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914, 78 S.Ct. 672, 2 L.Ed.2d 586.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WILLIAM P. GRAY, JUDGE PRESIDING

No. CR 83-218-WPG

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ, DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California

Dates: Monday, April 25, 1983
Tuesday, April 26, 1983

[52] THE COURT: I'm going to deny the motion to suppress the cocaine that she excreted. It seems to me that, under all the circumstances, the officers were justified in having a very substantial suspicion that this lady may very well be bringing in cocaine, to the point where they were justified in seeking and proposing an x-ray.

Having refused the x-ray, I am of the view—[53] it is my understanding that, under all those circumstances, they were justified in saying, "If you do not agree to an X-ray, we are not obliged to let you go. We will just keep you for a while until, A, we can send you back home; or, B, you have a regular bodily function that might indicate that you are carrying something."

I am putting aside the fact that they did ultimately get a warrant, because several things happened before they even applied for it. If they had no right to detain her as long as they did before that occurred, then they had no right to use the evidence that occurred while they were detaining her.

Under those circumstances, the motion to suppress will be denied.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-5125
DC. No. CR 83-215-WPG

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ,
DEFENDANT-APPELLANT.

[FILED AUG. 10, 1984]

ORDER

BEFORE: GOODWIN and TANG, *Circuit Judges*, and JAMESON, *District Judge*

A majority of the panel voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and an active judge called for a vote on whether to reconsider the matter en banc. A majority of the active judges voted against rehearing en banc. (Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for reharing en banc is rejected.

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No. 84-755

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

vs.

ROSA ELVIRA MONTOYA de HERNANDEZ, RESPONDENT

BRIEF IN OPPOSITION

TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

vs.

ROSA ELVIRA MONTOYA de HERNANDEZ, RESPONDENT

BRIEF IN OPPOSITION

TO PETITION FOR A WRIT OF CERTIORARI

Respondent ROSA ELVIRA MONTOYA de HERNANDEZ hereby files a brief in opposition to the Solicitor General's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 731 F.2d 1369.

QUESTION PRESENTED

WHETHER RESPONDENT, WHO WAS SUSPECTED OF ATTEMPTING TO SMUGGLE CONTRABAND DRUGS CARRIED WITHIN HER BODY AND WHO REFUSED TO SUBMIT TO AN X-RAY, COULD LAWFULLY BE DETAINED AT THE BORDER BY CUSTOMS OFFICERS FOR THE PERIOD OF TIME NECESSARY TO EXAMINE HER BOWEL MOVEMENTS.

STATEMENT OF THE CASE

The evidence below showed that shortly after midnight on March 5, 1983, Rosa Elvira Montoya de Hernandez arrived at the Los Angeles International Airport on a flight from Bogota, Colombia. After deplaning, Ms. de Hernandez proceeded to an immigration checkpoint where her travel documents were inspected. R.T. 6-7.[1/] Her passport and visa were found to be in order, and both Ms. de Hernandez' passport and the Immigration I-94 Form were stamped "admitted". R.T. 6-7. Ms. de Hernandez then proceeded to a customs line.

Customs officials reviewed her documents and directed Ms. de Hernandez to a secondary inspection area for a more thorough examination.[2/] There, United States Customs Inspector Jose Serrato reviewed Ms. de Hernandez' passport, visa and airline tickets, and questioned her about her trip

1/ R.T. refers to reporter's transcript.

2/Although the record in this case does not reflect why Ms. de Hernandez was referred from the primary to the secondary inspection area, the Fifth Circuit, in United States v. Mejia, 720 F.2d 1378 (5th Cir. 1983) addressed that issue in light of the facts of that case:

> "After routine preliminary questions, the customs officer sent Mejia to the secondary area because Mejia spoke no English and because he was arriving from a country known to be a source of narcotics. 720 F.2d at 1380

Like, Mejia, Ms. de Hernandez spoke no English, and was arriving from Colombia. E.R. 123-124.

to the United States. E.R. 84.[3] Her travel documents were in order and she was traveling on a valid Colombian passport. R.T. 8. Inspector Serrato noticed that Ms. de Hernandez' passport reflected at least eight previous trips to the United States. E.R. 84. Inspector Serrato asked Ms. de Hernandez about the following topics:

1. The purpose of her trip.
2. How long will she stay.
3. Did she have any agricultural products.
4. Did she have $5,000 in any currency.

E.R. 84.

Ms. de Hernandez told Inspector Serrato that she was coming to the United States on a business trip to buy merchandise, including clothing and small appliances, for her husband's store in Colombia. R.T. 17-18. Ms. de Hernandez showed Inspector Serrato a book of invoices containing receipts with her name on them, showing past buying trips at retail outlets on previous occasions when she was in this country. R.T. 18-19 (see Exhibit 102, received in evidence at the suppression hearing in the district court, R.T. 19). Inspector Serrato looked at the book of invoices and receipts. R.T. 18. Ms. de Hernandez then showed Inspector Serrato a business card from her husband's business in Colombia. R.T. 19-20.

In response to Inspector Serrato's further questions, Ms. de Hernandez told him that she had no family or friends in the United States, and that she would visit the stores in which she wished to make purchases by taxi. E.R. 123. Ms. de Hernandez had over $5,000.00 in cash in her possession. E.R. 124.

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[3] E.R. refers to the excerpt of record submitted to the court of appeals.

Inspector Serrato next examined Ms. de Hernandez' luggage and purse and noted the following:

> "Ms. de Hernandez' purse, at the time that she came into customs, contained the following: a make-up bag containing lipstick, mascara, rouge, mirror, eye liner, eye shadow; a purse containing perfume, hand cream, toothbrush, tooth paste, hairbrush, handkerchief, pictures of two children, a pen, and some U.S. currency;
>
> A suitcase containing nightgown, a 500 peso note, a pair of jeans, three blouses, three pairs of slacks, one green two-piece suit, assorted bras, panties and socks, two sweaters, and a brown skirt". R.T. 10.[2]

Based upon the foregoing investigation, and after summoning another Customs inspector to seek his advice, Inspector Serrato formed the opinion that Ms. de Hernandez fit the profile of persons suspected of carrying drugs concealed in their bodies. E.R. 123.

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[2] Inspector Serrato's sworn declaration, deemed his testimony on direct at the suppression hearing (R.T. 4), contained the statement that, when he examined Ms. de Hernandez' luggage, he noticed "no toiletries". E.R. 84. At the hearing, this was shown to be false. R.T. 10, 43.

Petitioner states that Ms. de Hernandez "carried little extra clothing or toiletries." (petition for certiorari, p.2). This statement mischaracterizes the facts. It might well be asked "little in relation to what?". Ms. de Hernandez was apparently never asked the length of her intended stay. Compare, United States v. Padilla, 729 F.2d 1367 (11th Cir. 1984) ("a few pairs of dungarees, a couple of T-shirts, and very little (sic) toiletries," which was "considered unusual for a visit of ten days." 729 F.2d at 1368.

Inspector Serrato thereupon directed that Ms. de Hernandez be taken to a search area for a pat-down search by a female customs inspector. E.R. 84. This "pat-down" search became a strip search. E.R. 98, R.T. 21, 37-38. The strip search failed to produce any evidence to support Inspector's Serrato's suspicions. R.T. 21, 37-38.

Inspector Serrato next asked Ms. de Hernandez to consent to an x-ray search. Ms. de Hernandez initially indicated she would consent, but later withdrew her consent. R.T. 21-22.

After Ms. de Hernandez had withdrawn her consent for an x-ray, she requested permission to call her husband. Inspector Serrato denied her request. Ms. de Hernandez then asked if Inspector Serrato would call her husband to verify the information she had provided. She offered to give the inspector the telephone number to do so. Inspector Serrato did not call her husband. R.T. 23.

REASONS FOR DENYING THE PETITION

Petitioner contends that a writ of certiorari should be granted because the decision of the Ninth Circuit Court of Appeals in this case is in direct conflict with a decision of the Eleventh Circuit Court of Appeals in United States v. Mosquera-Ramirez, 729 F.2d 1352 (11th Cir. 1984). Respondent disagrees. The two cases are distinguishable on their facts.

Mosquera-Ramirez, like Ms. de Hernandez, arrived on a non-stop flight from Bogota, Colombia shortly after midnight. Like Ms. de Hernandez, he presented himself and his luggage for customs clearance before a customs inspector, and was questioned about the purposes of his

trip. There the similarity ends. Mosquera-Ramirez presented an inherently incredible story concerning the purpose of his trip. He could not answer some questions. 729 F.2d at 1354. He gave inconclusive answers to other questions. 729 F.2d at 1355. He had no credit cards, checks or letters of credit, and insufficient cash to accomplish the alleged purpose of his trip. When confronted with this fact, Mosquera-Ramirez was unable to explain the inconsistency. 729 F.2d at 1354. He could not give a definite itinerary for his stay in Miami. When the agents noticed that Mosquera-Ramirez' passport indicated that he had traveled to Miami just two months previously, Mosquera-Ramirez "became very evasive and very nervous." 729 F.2d at 1354. When further questioned, Mosquera-Ramirez admitted that he was not in the billiards business, as he had originally claimed, but just worked at a billiards hall. 729 F.2d at 1354.

In holding that Mosquera-Ramirez' "articulably suspicious behavior" raised a reasonable suspicion, the Eleventh Circuit Court of Appeals noted that "a suspicion may be reasonable even though it rests substantially on the inability to give a credible explanation for a trip to this country." 729 F.2d at 1354.

In the case petitioner now seeks to convince this Court to review, none of the articulably suspicious behavior which supported an x-ray search in Mosquera-Ramirez was present. There was no evidence here of an inherently incredible story, no evidence of failure to answer questions, no evidence of evasive or nervous behavior, no evidence of lack of a definite itinerary, no admission to giving inaccurate information, or any of the other objective indicia of drug smuggling. There was no evidence of passport or visa

tampering, no evidence of possession of anti-diarrhea medication or laxatives,[3] no evidence that Ms. de Hernandez' body movements were restricted or stiff[4], no evidence of disorientation,[5] no evidence of recent drug use such as glazed or dilated eyes, needle marks on the arms, or slurred speech,[6] no tip from a confidential informant indicating Ms. de Hernandez would be smuggling drugs into the country[7], and no evidence from the Customs Bureau computer that Ms. de Hernandez had previously been involved in narcotics smuggling [8]. Instead of being unemployed with a large amount of cash, Ms. de Hernandez presented evidence of being employed, and the cash that she possessed was directly related to the stated purpose of her trip. As the Eleventh Circuit stated in United States v. Vega-Barvo, 729 F.2d 1341 (1984):

> "Since swallowers follow a different mode of operation, customs agents' suspicions will be aroused by different factors. For example, suspicion will not focus on bulky dress,. . . but on the traveler's inability to explain his or her trip. Id at 1350.

3/ United States v. Mendez-Jiminez, 709 F.2d 1300, 1302 (9th Cir. 1983).

4/ United States v. Shreve, 697 F.2d 873, 874 (9th Cir. 1983)

5/ United States v. Pino, 729 F.2d 1357, 1358 (11th Cir. 1984).

6/ United States v. Cameron, 538 F.2d 254, 255 (9th Cir. 1976).

7/ United States v. Couch, 688 F.2d 599, 600 (9th Cir. 1982).

8/ United States v. Aman, 624 F.2d 911, 912 (9th Cir. 1980).

Although "reasonable suspicion" is admittedly a less stringent standard than "clear indication", nevertheless, even the reasonable suspicion standard requires a showing of articulable facts which are particularized as to the person and as to the place to be searched." United States v. Vega-Barvo. 729 F.2d 1341, 1349.

It is instructive to compare the facts of this case with the facts of recent Eleventh and Fifth Circuit Cases applying the reasonable suspicion standard to uphold x-ray searches by Customs agents at the border:

1. United States v. Vega-Barvo, 729 F.2d 1341 (11th Cir. 1984) (manifest inconsistencies in explanation of purpose of trip, no business cards, extreme nervousness, pulsating carotid artery, suitcase contained "rags") 729 F.2d at 1343, 1350.

2. United States v. Pino, 729 F.2d 1357 (11th Cir. 1984) (claimed to be on business trip to buy television repair parts, yet was unable to name a single part to be purchased, "no business cards, manuals, forms or other business related accouterments," evasive, "did not know" answers to some questions, unusually nervous and disoriented throughout the inspection) 729 F.2d at 1358.

3. United States v. Castenada-Castenada, 729 F.2d 1360 (11th Cir. 1984)(extreme passivity, claimed to be a business man but "ridiculous" answers to questions about occupation, travel documents incorrectly completed, nervousness, pulsating carotid artery, rough, red hands indicating manual labor in the face of claim of middle or upper-middle class life, airline ticket for New York in the face of claim of intention to vacation at Disneyworld) 729 F.2d at 1362, 1363-64.

4. United States v. Hensa-Casteno, 729 F.2d 1364 (11th Cir. 1984)(claimed that airplane ticket was purchased on May 10 for cash, when face of ticket revealed it was purchased May 25 on credit, claimed to own electronic parts store and to sell televisions, but had no business card, knew names of no stores he planned to visit, and could not answer, or answered incorrectly, even superficial questions about televisions) 729 F.2d at 1365.

5. United States v. Padilla, 729 F.2d 1367 (11th Cir. 1984)(claimed to be a businessman but no business cards or other identification, "incongruous," "wildly implausible" story concerning purpose of visit: a plan to purchase three or four Xerox color photocopying machines with $971.00 cash, maintained that $971.00 enough to cover purchase, and related that machines would be transported back with him in a single piece of luggage, had no idea where such machines could be purchased, claimed to have hotel reservations at a particular hotel, which claim was shown to be false) 729 F.2d at 1368.

6. United States v. De Montoya, 729 F.2d 1369 (11th Cir. 1984)(lied about her conduct during the flight, claimed to have husband and children, but had no pictures of her family, claimed that husband an engineer but unable to say what kind of engineer, claimed that her suit was new, but unable to button it over bulging stomach, discrepancy between social status claimed and her appearance and poor quality personal effects) 729 F.2d at 1370-71.

7. United States v. Mejia, 720 F.2d 1378 (5th Cir. 1983) (airplane tickets contradicted declared itinerary, claimed to be a businessman on a buying trip, but not dressed as a businessman, no business suits in luggage, no

business cards, hands calloused consistent with manual labor) 720 F.2d at 1380.

Unlike the aforementioned cases, there was nothing unusual in Ms. de Hernandez' papers, responses, conduct, demeanor, appearance or personal possessions which warranted even a reasonable suspicion. Not even the Eleventh and Fifth Circuits permit an x-ray search based upon an inarticulate hunch. In the instant case, there were simply no articulable particularized facts which would have amounted to a reasonable suspicion that Ms. de Hernandez was internally smuggling narcotics. Furthermore, Inspector Serrato's statement that he and another inspector felt that Ms. de Hernandez "fit the profile" of a narcotics smuggler does not turn an inarticulate hunch into reasonable suspicion.

> ". . .what is significant for the reasonable suspicion standard is not the presence of generalized profile characteristics but articulable individualized suspicious behavior."

United States v. Castenada-Castenada, 729 F.2d 1360, 1363 (11th Cir. 1984); Accord, United States v. Mejia, 720 F.2d 1378, 1382 (5th Cir. 1983).

As the Ninth Circuit stated in the opinion below, ". . . thousands of unusual looking persons cross international borders daily on all sorts of errands, many of which are wholly innocent." 731 F.2d at 1372.

CONCLUSION

No x-ray search could have been justified in the case at bar even if the Ninth Circuit Court of Appeals had employed the reasonable suspicion standard currently utilized by the Eleventh and Fifth Circuits. Therefore, this case presents a poor vehicle for a dispositive exposition of the Fourth Amendments rights of persons entering this country who are suspected of drug smuggling. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER M. HORSTMAN
Federal Public Defender

DATED: January 9, 1984.

No. 84-755 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED NOVEMBER 8, 1984
CERTIORARI GRANTED JANUARY 21, 1985

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* The oral ruling of the district court denying the motion to suppress and the decision of the court of appeals are printed in the appendix to the petition for a writ of certiorari and have not been reproduced.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5125

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1983	
June 21	DOCKETED CAUSE and Entered Appearances of Counsel
Dec. 31	As of Dec. 8, Argued and Submitted Before: GOODWIN, TANG CJJ; JAMESON (MONTANA) DJ
1984	
Apr. 24	Filed Per Curiam Opinion—Reversed
Apr. 24	Filed and Entered JUDGMENT
Aug. 10	Filed Order (GOODWIN, TANG, JAMESON). The petition for rehearing is denied and the Suggestion for rehearing en banc is rejected.
Sept. 19	Filed Order (Goodwin, TANG, JAMESON). The motion to stay issuance of the mandate of this court pending the filing of a petition for certiorari with the United States Supreme Court is GRANTED. Issuance of the mandate is stayed until Oct. 16, 1984.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

CR-83-00215-01

Criminal Dockets

UNITED STATES

v.

HERNANDEZ, ROSA ELVIRA MONTOYA DE

Judge: Judge Gray — Case filed 03/11/83

DATE	EVENT
3/5/83	Defendant arrested
3/11/83	Filed magistrate complaint; Defendant's first appearance; Arraignment on magistrate complaint held
3/18/83	Filed indictment
3/28/83	Arraignment held
4/13/83	Motion to suppress evidence filed
4/25/83	Motion to suppress evidence hearing held
4/25/83	Motion to suppress evidence denied
4/26/83	Filed waiver of jury trial; Trial begins—bench; trial ends—bench; Court Judgment of guilty
6/6/83	Sentencing of defendant
6/10/83	Filed Notice of Appeal

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

March 1983 Grand Jury

CR 83-215

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ, DEFENDANT

[21 U.S.C. § 841(a)(1): Possession with Intent to Distribute Narcotic Drug Controlled Substance; 21 U.S.C. §§ 952(a); 960(a)(1): Importation of Narcotic Drug Controlled Substance]

INDICTMENT

The Grand Jury charges:

COUNT ONE

[21 U.S.C. 841(a)(1)]

On or about March 5, 1983, in Los Angeles County, within the Central District of California, defendant ROSA ELVIRA MONTOYA de HERNANDEZ knowingly and intentionally possessed with intent to distribute approximately 660 grams of cocaine, a Schedule II narcotic drug controlled substance.

COUNT TWO

[21 U.S.C. 952(a), 960(a)(1)]

On or about March 5, 1983, in Los Angeles County, within the Central District of California, defendant

ROSA ELVIRA MONTOYA de HERNANDEZ knowingly and intentionally imported approximately 660 grams of cocaine, a schedule II narcotic drug controlled substance, into the United States from Bogota, Colombia, in violation of Title 21, United States Code, Sections 952(a) and 960(a)(1).

A TRUE BILL

_____

Foreperson

_____

STEPHEN S. TROTT
United States Attorney

TRANSCRIPT OF PROCEEDINGS

[3] LOS ANGELES, CALIFORNIA;
MONDAY, APRIL 25, 1983; 2:55 P.M.

THE CLERK: Item No. 22, CR 83-215, U.S.A. vs. Rosa E.M. de Hernandez, on calendar for defendant's motion to suppress evidence and statements; and defendant's motion to dismiss.

MS. LEVINE: Good afternoon, your Honor. Janet Levine on behalf of Rosa Elvira Montoya de Hernandez, who is present.

Your Honor, also present is Ely Weinstein, a court certified interpreter.

THE COURT: All right. Good afternoon, ladies. Just be seated, please.

Mr. NIESEN: Good afternoon, your Honor. Jeffrey Niesen for the United States.

THE COURT: Are we going to have testimony in this case?

MS. LEVINE: Brief testimony, your Honor. I would imagine that the testimony would be only on the suppression motion, and would last a total of approximately an hour. But I do think there are certain points that must be brought out. An hour, including argument, your Honor.

THE COURT: Call the Ashkenazy case.

(Other brief matter heard)

[4] THE COURT: Is it the motion to suppress that you want to have testimony on?

MS. LEVINE: No, your Honor. Just the motion to suppress.

THE COURT: May the declaration by the government's witnesses be deemed as direct evidence, subject to cross-examination?

MS. LEVINE: Your Honor, with the exception of a few lines which I would intend to move the Court to strike

at the beginning of each witness' testimony, yes, they may be admitted.

THE COURT: Whom do you want to cross-examine?

MS. LEVINE: Your Honor, I would like to cross-examine Inspector Serrato—everybody who has submitted a declaration, in essence, your Honor, although some will be quite brief, approximately two to three minutes each.

THE COURT: Is there anything that the government wants to put on in supplementing your declarations?

MR. NIESEN: Yes, your Honor. I have submitted a written stipulation to Counsel. I don't know whether it's been signed yet.

MS. LEVINE: Your Honor, it was just read in Spanish to Ms. de Hernandez, who signed it, and I will be [5] signing it. This goes to the Rule 5 motion, and it has been signed.

THE COURT: All right.

MS. LEVINE: May I approach Counsel?

THE COURT: Of course.

MR. NIESEN: With respect to the motion to suppress, Your Honor, the United States will rest on the declarations prepared.

THE COURT: What first witness do you want?

MS. LEVINE: Your Honor, I'd like to first call Inspector Serrato, and I'd like the other witnesses to be excused.

THE COURT: I think they have already left.

MS. LEVINE: Thank you.

THE COURT: Is somebody calling him?

MR. NIESEN: Yes, your Honor.

JOSE A. SERRATO,

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

MS. LEVINE: Your Honor, with this witness, on his declaration, paragraph 6, the last sentence—that's lines

23 to 24—contains hearsay in the extent it says that "we both acknowledged," talking towards Inspector Talamantes; and I would move to strike only [6] that sentence of the declaration that contains hearsay.

THE COURT: Well, let's see. This statement, to the extent that this statement acknowledged or agreed or asserted that she fits the profile, that's his expression of opinion, which I will accept.

If Mr.—who is the other man? Who is the other part of the "we"?

MS. LEVINE: Talamantes, your Honor.

THE COURT: Mr. Talamantes presumably expressed that belief also, which could be the basis for this man's acting.

I'll deny the motion.

MS. LEVINE: Very well, your Honor.

THE CLERK: May I ask the witness to state his full name, and spell his last name for the record.

THE WITNESS: Jose A. Serrato, S-e-r-r-a-t-o.

CROSS EXAMINATION

BY MS. LEVINE:

Q. Inspector Serrato, before a passenger arrives at your station in Customs, they are cleared through Immigration. Is that correct?

A. Yes.

Q. Immigration checks the passenger's documentation; correct?

[7] A. Yes.

Q. With an alien, the passport and visa are checked; correct?

A. Pardon me. I didn't understand.

Q. The passport is checked by Immigration, isn't it?

A. Yes.

Q. And the visa is checked also.

A. Yes.

Q. If everything is in order there, the passport is stamped and admitted; right?

A. Yes.

Q. The visa is also stamped.

A. No.

Q. The I94 is stamped admitted; right?

A. Yes.

Q. An I94 is an Immigration document; right?

A. Yes.

Q. The passenger is then referred to Customs; correct?

A. Yes.

Q. On March 5th, 1983, Mrs. de Hernandez was referred to you in Customs; right?

A. Yes.

Q. For a Customs inspection; correct?

[8] A. Yes.

Q. She presented her passport to you; correct?

A. Yes.

Q. Included in the passport was her I94 document; right?

A. Yes.

Q. You examined the passport, didn't you?

A. Yes.

Q. The passport and the I94 were both stamped admitted, weren't they?

A. Yes.

MS. LEVINE: Your Honor, I have two exhibits that the clerk asked me to hold until trial.

THE COURT: All right.

MS. LEVINE: I would like this exhibit marked Defense 101 for identification and placed before the witness.

THE COURT: Is there any doubt but that she did pass through Immigration with a valid passport?

MR. NIESEN: Your Honor, the government will stipulate that she cleared through Immigration on a Colombian passport.

MS. LEVINE: Very well. I move the passport [9] into evidence, Your Honor.

MR. NIESEN: I have no objection.

THE COURT: All right. It may be received.

THE CLERK: It will be marked Exhibit A.

(Defendant's Exhibit 101 marked for identification and received in evidence.)

BY MS. LEVINE:

Q. After you asked Mrs. de Hernandez some questions, you examined her luggage; correct?

A. Yes.

Q. She had a suitcase with her; right?

A. Yes.

Q. She had a purse with her; right?

A. Yes.

MS. LEVINE: Your Honor, the government and I have entered a stipulation as to the contents of the purse and the luggage, so as not to take up much of the Court's time. It would be an oral stipulation. It hasn't been written, but I present it to the Court as follows:

"The United States of America, by Jeffrey Niesen, Assistant United States Attorney, and defendant Rosa Elvira Montoya de Hernandez, by and through her lawyer Janet I. Levine, hereby stipulate as follows:

[10] "Ms. de Hernandez' purse, at the time that she came into Customs, contained the following: a make-up bag containing lipstick, mascara, rouge, mirror, eye liner, and eye shadow; a purse containing perfume, hand cream, toothbrush, toothpaste, hairbrush, handkerchief, pictures of two children, a pen, and some U.S. currency;

"A suitcase containing nightgown, a 500-peso note, a pair of jeans, three blouses, three pairs of slacks, one green two-piece suit, assorted bras, panties and socks, two sweaters, and a brown skirt."

That would be the stipulation, your Honor.

MR. NIESEN: The United States will stipulate to that.

THE COURT: All right.

What's the burden of your contention, Ms. Levine?

MS. LEVINE: Your Honor, the point I'm trying to make in this motion is that Ms. de Hernandez came into the United States, she was examined by the Customs inspector, Inspector Serrato, and he examined her luggage; and at that point, he had her pat-searched, and he had her strip-searched, and nothing was found.

Further, he asked her to consent to an X-ray search. She did not consent.

[11] THE COURT: Yes.

MS. LEVINE: Then he asked to get a court order. The agent did not get a court order. At that point, there was no clear indication or any cause to hold her.

THE COURT: Not probable cause.

MS. LEVINE: Not clear indication, your Honor. Clear indication is—

THE COURT: How could there be a clear indication if the officer suspects that she's carrying something in her alimentary canal?

MS. LEVINE: Generally, the cases finding clear indication note the following, which aren't noted in this case:

The individual walks in an unusual or strained manner —that would be in Shreve, your Honor; there is a lubricant of some kind; or there is some information—

THE COURT: I'm never going to be able to assert that these fellows did not have a valid ground for suspicion. Not probable cause, but under the circumstances of this case, when, A, she comes in from Colombia; that of itself is of little significance. She has been here four times before, either to Miami or LAX. She appeared nervous. She did not know where she got her airline ticket. She knew no one here. She was coming in [12] here to buy things for her husband's store at retail stores.

I think that is enough to have a strong suspicion that she may be carrying something.

Now, the only way possible to find that out is to take an X-ray; and if she refuses the X-ray, I'm prepared to

hold that the government had a right to refuse to allow her to come in and to send her home on the next plane.

MS. LEVINE: Your Honor, I would state the following: First, Ms. de Hernandez—which I will elicit from Mr. Serrato—came into the country with receipts with her name on them, showing past buying trips at retail outlets at the time she was in the country.

Second, your Honor, there is no declaration that states that she was nervous.

THE COURT: I read that in one of the declarations, I believe.

MS. LEVINE: Your Honor, it is in the facts, but in no declaration. It's attached to the affidavit to get the warrant.

THE COURT: Ms. Levine, I'm not going to require these fellows, with that suspicion, to send her out into the community, under the circumstances that are in the declaration. If it isn't stated that she's nervous, [13] sobeit.

MS. LEVINE: Your Honor, the standard is not just a hunch or a suspicion or even a reasonable suspicion for a strip search. It's a high standard of clear indication.

As the court, the Ninth Circuit, in Ek stated it, there must be a clear indication of body smuggling. Not some suspicion that she is engaged in something, but a clear indication that there is something in her body.

THE COURT: So your contention is that, under all the circumstances, they were obliged to let her go.

MS. LEVINE: Yes, exactly.

THE COURT: Even though she refused to have an X-ray.

MS. LEVINE: Exactly, your Honor. My contention is that you can't make someone give up their right to enter this country when their passport is in order, on giving up some other right they are entitled to, a Fourth Amendment right. She is legally admitted, and there is no clear indication to hold her.

Just based on some suspicion, the Ninth Circuit has held that that is not sufficient to hold her.

THE COURT: Well, the Ninth Circuit may have to hold it again in this case, because the Ninth Circuit didn't have this case before them.

[14] But it seems to me that they had a right to, particularly in view of the fact that during the next several hours she would not eat anything or drink anything or go to the bathroom; plus the fact that, when another officer came, he concluded that they should seek a warrant. They had a right to wait for a while until they could get a search warrant.

Apart from that, I will hold that, as far as this Court is concerned, that under the facts that were before them, they had the right to—since she would not accept an X-ray, they had a right to send her back to Colombia.

MS. LEVINE: Your Honor, I will argue the motion later. There are some facts that I am going to need to get out for the record, and there are some things that I'd like to address that the Court just mentioned.

THE COURT: All right.

MS. LEVINE: First, that she did not eat or drink or use the restroom for several hours is material that was gathered by Customs after what I believe was an illegal detention.

THE COURT. Yes. If I conclude that they had no right to detain her, to send her home, the latter would be out of bounds.

MS. LEVINE: Second, there is no right for [15] Customs, and the government has cited no grounds, to deport people. People have to be deported through the Immigration process. A Customs officer has no right to say, when someone has been lawfully admitted, "I've just decided to deport you."

THE COURT: I don't think it's a matter of deportation. I don't think she was in yet.

MS. LEVINE: Your Honor, I would cite the Court—and I would look it up later—to a regulation from a CFR

which states that an individual is admitted at the time the Immigration officer stamps them as admitted, and at that point they are admitted into the United States for all purposes.

Customs can only deal with them carrying in materials that they shouldn't be carrying in.

THE COURT: Which, of course, was this case.

MS. LEVINE: Well, your Honor, that doesn't mean that they can deport somebody. That just means that they are a separate law-enforcement agency that has an ability to enforce laws.

The Drug Enforcement Administration is a law agency, but they can't deport people.

THE COURT: Does the government agree that, in view of where this lady was, the officer had no right to say, "If you won't have an X-ray, we will put you [16] back on the plane to Colombia"?

MR. NIESEN: No, your Honor. I think what's critical here—and there is no doubt, and I don't want to mislead the Court at all—there is no doubt that this person cleared through Immigration.

However, the process of coming into the United States involves clearing both Immigration as well as Customs.

In this particular case, this lady never cleared Customs. She was given an alternative, or actually told what the alternative would be, which is that they would return her on the next available flight. That is exactly what they proceeded to attempt to do.

THE COURT: There is also some indication of their right to detain her until the natural processes of elimination have had a chance to function.

MS. LEVINE: Your Honor, that would be footnote 5 of Couch, and Couch is clearly a probable cause case. In Couch, there was not only a—and the court said that in dictum—there was not only a reliable informant's tip that Ronald Couch was coming through with drugs in him, there were a lot of self-authenticating facts, including where the ticket was purchased; and it's totally inapplicable to the facts of this case.

THE COURT: All right, Ms. Levine. You make [17] your record.

But I go back to the proposition: The Constitution prohibits unreasonable searches and seizures. I'm clearly of the view, and I know a record is being made of this, that under all the circumstances the officers had a right, A, to be very suspicious, to the point of proposing an X-ray; and if this lady refused the X-ray, that would tend to confirm the suspicion, and I believe they had a right not to allow her to remain in the country, or not to allow her in, whatever the case may be, and they had a right to send her back to Colombia.

In the meantime, I also believe that they had a right—once they concluded that they would seek a warrant to justify the X-ray, they had a right to detain her while seeking to obtain that warrant.

Then, of course—I forget whether they found the first balloon before or after the warrant was obtained.

MS. LEVINE: After the warrant, your Honor.

If I may, I want to address those issues now, but I will save it later for argument, because I think they are—

THE COURT: Now you make your record.

MS. LEVINE: Thank you, your Honor.

Q. You asked Ms. de Hernandez some questions when she passed through your secondary Customs station, [18] didn't you?

A. I asked her some questions, yes.

Q. You asked her why she was here; right?

A. The nature of her trip, yes.

Q. She said that it was a business trip; right?

A. Yes.

Q. She said she was here to buy items for her husband's store in Colombia; right?

A. Yes.

Q. She said those items were clothing; right?

A. Yes.

Q. And some appliances; right?

A. Small appliances.

Q. Ms. de Hernandez had a book of invoices with her, didn't she?

A. Yes.

Q. She showed that book to you, and you looked at it; right?

A. Yes.

MS. LEVINE: May I approach the clerk, your Honor?

THE COURT: Yes.

MS. LEVINE: May I have that marked Defense Exhibit 102 for identification.

THE CLERK: Did you assign the passport a [19] number?

MS. LEVINE: 101.

THE CLERK: Okay. I didn't hear that.

102 is marked for identification and is before the witness.

(Defendant's Exhibit 102 marked for identification.)

BY MS. LEVINE:

Q. That is the book of invoices she showed you, is it not?

A. Yes.

Q. That's the book she brought into the United States; right?

A. Yes.

MS. LEVINE: I would move that into evidence, your Honor.

MR. NIESEN: No objection.

THE COURT: It may be received.

(Defendant's Exhibit 102 received in evidence.)

MS. LEVINE: Your Honor, I ask the Court to examine those invoices, too.

THE COURT: I don't need to.

BY MS. LEVINE:

Q. Ms. de Hernandez showed you a business card, [20] didn't she?

A. Yes.

Q. She said that was from her husband's business in Colombia; right?

A. Yes.

MS. LEVINE: May I approach the clerk, your Honor?

THE COURT: Yes.

All of that is in one of the declarations, is it not, the business card? I remember that.

MS. LEVINE: Your Honor, it is in the declaration. However, I would like this witness to identify this business card.

THE CLERK: Exhibit number, please, Counsel.

MS. LEVINE: 103.

THE CLERK: Exhibit 103 is marked for identification and is before the witness.

(Defendant's Exhibit 103 marked for identification.)

BY MS. LEVINE:

Q. That's the business card, isn't it?

A. Yes.

MS. LEVINE: I move that into evidence, your Honor.

MR. NIESEN: No objection, your Honor.

[21] THE COURT: It may be received.

(Defendant's Exhibit 103 received in evidence.)

BY MS. LEVINE:

Q. After you examined Ms. de Hernandez' luggage, you called a female Customs inspector over; correct?

A. No.

Q. You spoke to a female Customs inspector about having a personal search done on Ms. de Hernandez, didn't you?

A. Not immediately afterward.

Q. You did speak to a female Customs inspector about having her searched then, did you not?

A. Yes, I did.

Q. A search was done, to your knowledge; right?

A. Yes.

Q. Nothing was discovered in the search, to your knowledge; correct?

A. Correct.

Q. Then you asked Ms. de Hernandez to consent to an X-ray; right?

A. Yes.

Q. She didn't consent.

A. She consented initially.

Q. She did not consent eventually; correct?

[22] A. Towards the end, no.

Q. So she did not allow you to take an X-ray of her; right?

A. No.

Q. Now, to get a court order for an X-ray, you have to go through your supervisor; right?

A. We pass the information to him, yes.

Q. So you spoke to the supervisor about getting a court order; right?

A. Yes.

Q. Now, Inspector Serrato, you're not trained in the law, are you?

A. I don't understand the question.

Q. You are not trained in what degree of suspicion is necessary to get a court order, are you?

A. No.

Q. At some point, you heard that no court order would be issued in this case; right?

A. Yes.

Q. You were told that by your supervisor; right?

A. Yes.

Q. While you were waiting to hear if you would get a court order, you held Ms. de Hernandez in custody, didn't you?

A. I don't understand your question.

[23] Q. You held Ms. de Hernandez while you were waiting to get that court order; right?

A. I still don't understand your question.

Q. While you were waiting to hear from your supervisor about the court order, Ms. de Hernandez was in your presence; right?

A. Yes.

Q. She wasn't free to leave, was she?

A. No.

Q. During that time, she asked you if she could call her husband, didn't she?

A. Yes.

Q. She told you that you should call her husband, didn't she?

A. Yes.

Q. To verify the information she gave you; right?

A. Yes.

Q. She offered to give you the phone number; right?

A. Yes.

Q. You didn't call her husband, did you?

A. No.

Q. Now, when the Customs inspector came back and told you there would be no court order, he gave you some instructions; right?

A. Yes.

[24] Q. He instructed you to hold Ms. de Hernandez in your custody for deportation; right?

A. Not in my custody.

Q. To have her held for deportation; right?

A. No. She was going to be detained.

Q. He instructed you to detain her.

A. Yes.

Q. The purpose of the detention was a deportation; right?

A. To have her leave the country, yes.

Q. This was about 1:00 A.M.; right?

A. Yes.

Q. You told Ms. de Hernandez that you were holding her for a deportation, didn't you?

A. Yes.

Q. You told her she was to remain in your custody during that period; right?

A. Yes.

Q. She was not allowed to leave your custody or the custody of Customs during that period, was she?

A. No.

Q. At this point, you told her that you thought the next plane would not be until Monday; right?

A. Yes.

Q. That's two days later; right?

[25] A. Yes.

Q. You thought you could hold her for two days; right?

A. I don't understand your question.

Q. You thought you could hold her in your custody for two days; right?

A. I don't understand your question.

Q. That the next plane wasn't until Monday. Did you think you could hold her until that Monday?

A. I was instructed to.

Q. If the next plane hadn't been for seven days, did you think you could hold her for seven days?

MR. NIESEN: Objection, your Honor. Calls for speculation.

THE COURT: Sustained.

BY MS. LEVINE:

Q. After you found out you were to detain Ms. de Hernandez, you took her to the manifest room; right?

A. Yes.

Q. You sat with her in that room; right?

A. Yes.

Q. She was in your custody at that time; right?

A. Yes.

Q. She was there with another Customs inspector;

[26] right?

A. Yes.

Q. She was not free to leave; right?

A. No.

Q. Now, this was about 1:30 A.M. you went to the manifest room; right?
A. Yes.
Q. You left work that day at 8:30 A.M.; right?
A. Yes.
Q. That was seven hours later; right?
A. Yes.
Q. She was kept in that room the entire seven hours.
A. Yes.
Q. During that seven hours, she was not searched, was she?
A. No.
Q. She wasn't there for any search, was she?
A. No.
Q. In the manifest room, there were chairs; right?
A. Yes.
Q. There wasn't a bed, was there?
A. No.
Q. There wasn't a couch?
A. No.
[27] Q. They are typical office chairs; right?
A. Yes.
Q. Straight back?
A. No, they're curved.
Q. Slightly curved.
A. Yes.
Q. She sat in that chair for seven hours; right?
A. Yes.
Q. Then you left work.
A. Yes.
MS. LEVINE: Nothing further of this witness.
THE COURT: Do you wish to examine the witness?
MR. NIESEN: I have nothing further of this witness.
THE COURT: Sir, you may be excused. Thank you for your testimony.

(Witness excused.)

THE COURT: What further witnesses do you desire?
MS. LEVINE: Your Honor, Kyle Windes, please.
THE COURT: Is anyone getting him.
MR. NIESEN: Just a moment, your Honor. We will get him.

(Witness sworn.)

THE COURT: We'll recess for 10 minutes, until [28] 25 minutes of 4:00.

(Recess.)

KYLE EUGENE WINDES,

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Sir, would you please state your name and spell your last name for the record.
THE WITNESS: My name is Kyle Eugene Windes, last name is W-i-n-d-e-s.
MS. LEVINE: Attached to Mr. Windes' declaration is the affidavit in support of the court order, and I have no objection to that being admitted as being the affidavit in support of the court order. However, much of the information came from, if not all of it, Inspector Talamantes, who is not here and will not be here.

I would move to have that limited to only being used as the affidavit for the court order and not being used as Mr. Windes' testimony in court today.

THE COURT: All right.

CROSS EXAMINATION

BY MS. LEVINE:

Q. Agent Windes, you were the Customs duty agent [29] on March 5th, 1983; right?
A. Yes.
Q. As the Customs duty agent, if a court order is to be sought, it's your duty to contact the U.S. Attorney; right?

A. In such an instance as this, yes.

Q. The Customs inspectors go through you in getting the court order; right?

A. Yes.

Q. Now, on March 5th, you received a call from Customs Inspector Olinde at about 1:30 A.M.; right?

A. Yes.

Q. You were sleeping at the time you received the call, weren't you.

A. Yes.

Q. Olinde asked you to obtain a court order for an X-ray search of Ms. de Hernandez; right?

A. I don't know that he specified what the search—what the affidavit would be, or the court order would be for; but they wanted a court order, I think in terms just generally of a court order was used.

Q. You told Inspector Olinde that the current policy was not to obtain court orders; right?

A. That's right.

Q. The current policy, you told him, was at that [30] point to deport somebody; right?

A. No. I told him that the policy at that time, as I understood it, was that people in these situations would voluntarily submit to medical examination, remain in custody until such time as the Customs personnel were satisfied that they were not carrying contraband, or leave the country; the choice being theirs.

Q. But at 1:30 A.M., you took no steps to obtain a court order; right?

A. No, I did not.

Q. You were called again at about 3:30 A.M. by Olinde; right?

A. Yes.

Q. He again asked you about a court order; right?

A. Yes.

Q. You were asleep at that time; right?

A. Yes.

Q. You again reiterated the policy was not to obtain court orders; right?

A. Yes.

Q. It wasn't until about 4:00 P.M. on the 5th of March that you began to prepare an affidavit for getting a court order; right?

A. That's correct.

Q. Between 1:30 A.M., when you were first called, [31] and 4:00 P.M. you took no positive steps in obtaining a court order, did you?

A. That is correct.

Q. So when the defendant was in custody from 1:30 A.M. to 4:00 P.M., it was not for the purpose of obtaining a court order; right?

A. That is correct.

MS. LEVINE: Nothing further of this witness.

THE COURT: Do you wish to examine the witness?

MR. NIESEN: I have nothing, your Honor.

THE COURT: All right, Mr. Windes, you may be excused. Thank you for your testimony.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

THE COURT: What's next, please?

MS. LEVINE: Marilee Morgan, your Honor.

Your Honor, while we are waiting for the witness, if I may bring out the parts of this that I would object to.

THE COURT: All right.

MS. LEVINE: Paragraph 4 of the last sentence, starting at line 26:

> "She seemed to make a point of letting us know she had pictures of her children."

Your Honor, I believe that' speculative, and I [32] move to strike that statement.

THE COURT: All right, that may be disregarded.

MS. LEVINE: Paragraph 12, starting on line 23:

"While driving next door to the county ward, Talamantes made a comment that Hernandez had just offered him a bribe."

I believe that's all hearsay, and I move to strike it.
MR. NIESEN: Your Honor, I would join with that.
THE COURT: Yes, that will be disregarded.
MS. LEVIN: That would be all, your Honor.
THE COURT: All right.

MARILEE SUE MORGAN,

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Ma'am, would you please state your full name and spell your last name for the record.
THE WITNESS: Marilee Sue Morgan, M-o-r-g-a-n.
THE CLERK: Thank you.

CROSS EXAMINATION

BY MS. LEVINE:

Q. Ms. Morgan, do you speak Spanish?
A. Very little.
[33] Q. In your declaration, Ms. Morgan, you state that Talamantes explained the situation to her, and at that point you are talking about the court order situation.
Now, tell me—
MR. NIESEN: Excuse me, Counsel. Can you tell me where you are referring?
MS. LEVINE: That would be paragraph 9 of the declaration, lines 26 to 27. I'm sorry.
THE COURT: All right.
BY MS. LEVINE:
Q. Talamantes, when he spoke to Ms. de Hernandez, he spoke in Spanish; right?
A. Yes.
Q. So you don't really know what he was saying to her, do you.

A. Not really.
Q. Now, on page 3 of your declaration, paragraph 12, you state on line 21 that Ms. de Hernandez was read the Miranda warnings in Spanish; and you don't really know if she was read the Miranda warnings, do you?
A. He had the warning in his hand, and he read them to her.
Q. Something was said in Spanish: right?
A. Yes.
[34] Q. You don't know what the content was.
Now, it was about 9:15 A.M. that you began sitting with Ms. de Hernandez on March 5th; right?
A. Yes.
Q. At that time, she was in a search room; right?
A. Yes.
Q. The search room is not a large room, is it?
A. No, it's not.
Q. There were chairs in the room; right?
A. Yes.
Q. Ms. de Hernandez had a chair to sit in.
A. Yes, she did.
Q. That was an office-type chair; right?
A. Yes.
Q. There was no place for her to lie down in that room, was there.
A. Just on the floor.
Q. It's a hard floor; right?
A. Yes.
Q. Uncarpeted.
A. Uncarpeted.
Q. You sat with Ms. de Hernandez in that room from about 9:15 A.M. until about 12:00 A.M., with the exception of one hour; right?
A. Correct.
[35] Q. That's about 14¼ hours; right?
THE COURT: Well, whatever the arithmetic is.
MS. LEVINE: Very well.
Q. She was in your custody that entire time; right?
A. Yes.

Q. At about 3:00 P.M., you participated in a strip search of Ms. de Hernandez; right?

A. Correct—excuse me. It was more a partial strip search.

Q. You had her take down her pants.

A. Yes.

Q. And her panties; right?

A. Yes.

Q. Nothing illegal was found in that search; right?

A. No.

Q. In your declaration, it states that Ms. de Hernandez had no toilet articles in her suitcase; right?

A. Right.

Q. Did you examine her purse?

A. I didn't.

Q. So you don't know if she had toilet articles in there; right?

A. Correct.

MS. LEVINE: Nothing further of this witness.

[36] THE COURT: Do you wish to examine the witness?

MR. NIESEN: I have nothing further.

THE COURT: All right, Ms. Morgan. You may be excused. Thank you for your testimony.

(Wtiness excused.)

THE COURT: What's next?

MS. LEVINE: Your Honor, it would be Inspector Mendoza, and there will be one final inspector, Gonzalez, and they will both be short cross-examinations, your Honor.

Your Honor, in Inspector Mendoza's declaration, paragraph 11, the last sentence of the declaration, that's lines 12 through 13:

> "This passenger had also claimed pregnancy as per Inspector Serrato."

I believe that's been established, but in this declaration, it is hearsay.

THE COURT: Whereabouts are we?

MS. LEVINE: The last page of the declaration, lines 12 through 13.

MR. NIESEN: Page 35, your Honor.

I have no objection.

THE COURT: Very well.

• • • •

[37] called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Ma'am, would you please state your full name and spell your last name for the record.

THE WITNESS: My name is Teodora A. Mendoza, M-e-n-d-o-z-a.

THE CLERK: Thank you.

CROSS EXAMINATION

BY MS. LEVINE:

Q. Inspector Mendoza, do you speak Spanish?

A. Very little.

Q. Now, on March 5th, 1983, at about 12:30 A.M., you were requested by Inspector Serrato and Inspector Ozawa—I believe that's how it's pronounced—to do a pat search of Ms. de Hernandez; right?

A. That is correct.

Q. During that pat search, there was cause for you to have Ms. de Hernandez pull down her pants; right?

A. That is true.

Q. And her panties; right?

A. She voluntarily pulled her panties down. I didn't have to request that.

Q. Nothing illegal was found during that search; [38] right?

A. No.

Q. In your declaration, you state that—this is on paragraph 10, line 26:

"Passenger was informed in Spanish by Inspector Serrato of her impending deportation and was quite agreeable."

Did you speak to Ms. de Hernandez in Spanish?

A. Myself, no.

Q. You didn't understand when Inspector Serrato was speaking to her in Spanish, did you?

A. I can understand some Spanish from what I've had in school and overall dealing in general. My comprehension is somewhat better than my ability to speak it. So I was able to pick out some words and determine that he was giving her this information.

Q. But you couldn't understand everything that was said.

A. Everything, no.

Q. Now, at about 1:00 A.M. you were told that no court order would be issued in this case; right?

A. I was told that they weren't going to go for one.

Q. You were instructed to detain Ms. de Hernandez for deportation; right?

[39] A. That is true.

Q. You remained with her from 1:00 A.M. for several hours; right?

A. Yes.

Q. You took her to a room during that period to watch her; right?

A. That is true.

Q. When she was in that room, she was told that if she had to use the restroom she was to do that in a wastebasket; right.

A. Yes.

Q. The wastebasket was going to be in the bathroom; is that right?

A. Yes.

Q. If she had decided to use the wastebasket, she would have been observed by Customs inspectors doing so; right?

A. Two females.

Q. Two female Customs inspectors would have watched her as she used the restroom; right?

A. That is correct.

MS. LEVINE: Nothing further.

MR. NIESEN: Two quick questions, your Honor.

[40] REDIRECT EXAMINATION

BY MR. NIESEN:

Q. Counsel used the word "deportation." Were you told that she was to be deported, or were you told that she was to get the next flight back to Columbia?

A. The word that was used, and also incorrectly by our own people, was "deported." But it meant the same thing, to be sent out of the country.

Q. My last question is: With respect to this two females watching her go to the bathroom, what's the purpose of that?

A. Well, being that we did have our suspicions of her and we were detaining her, it was to prevent her from flushing a toilet, just in case she had had, you know, foreign objects within her body and they did get expelled.

MR. NIESEN: Nothing further, your Honor.

THE COURT: You may be excused. Thank you for your testimony.

(Witness excused.)

THE COURT: What's next?

MS. LEVINE: Inspector Gonzalez would be the final witness, your Honor.

Looking at my questions, I don't believe there is any necessity for having Inspector Gonzalez testify.

THE COURT: All right. Would you call him off, [41] Mr. Cochran, please.

MR. NIELSEN: May these witnesses be excused? They do have to get to work.

THE COURT: Are your witnesses excused?

MS. LEVINE: Yes, your Honor.

THE COURT: Yes, they may be excused.

MR. NIESEN: Thank you, your Honor.

THE COURT: Anything that you would like to present?

MS. LEVINE: No evidence, your Honor. I would like the chance to argue.

THE COURT: Go right ahead.

MS. LEVINE: Thank you, your Honor.

I do have some feeling that I'm arguing up a sinking ship in this court, but I'll do my best.

THE COURT: I'm not sure about the metaphor, but—

MS. LEVINE: I'm not sure it came out correctly, but I think the Court has some idea of what I'm trying to say.

THE COURT: Yes, I think I do.

MS. LEVINE: Your Honor, in any border search question, the first proposition is that an ordinary border search can be conducted without any cause, and I think that is clear.

[42] To do any further search outside the ordinary, further kinds of cause are needed: To do a strip search, real suspicion is needed; to do a body cavity or an X-ray search, there must be a clear indication that the suspect is involved in body cavity or internal smuggling.

THE COURT: How do you get such an indication?

MS. LEVINE: Well, the cases, your Honor, that have found clear indication have had things other than just suspicions. What they've had, and I have some here: U.S. v. Aman, your Honor.

THE COURT: Don't cite the cases. Just tell me what, in your reading, what do you have to have?

MS. LEVINE: In order to have an X-ray, your Honor, they have to have either restricted body movement, computer entries relating to drug use, inconsistent answers to questions, lack of substantiation, disorientation, evidence of recent drug use like needle marks on the arms.

In this case, there is no such thing. In this case—

THE COURT: There are no needle marks on the arms, but the recital that I made earlier was based upon the record, was it not, except with respect to the looking nervous?

MS. LEVINE: Your Honor, what I would say they [43]at the point Ms. de Hernandez crossed Customs, when they first held her, is what's in the declaration of Inspector Serrato, who was the person working secondary who detained her initially.

If the Court looked at the declaration of Inspector Serrato—it begins on page 19—it doesn't recite any of those things about nervousness. All Inspector Serrato says is she had no shoes, no toiletries, and little clothing, which we know is wrong from the stipulation. From the stipulation, the woman had four pairs of pants, two skirts, plus the clothing she had on, her jacket, three blouses, two sweaters, plus substantial toiletries. And she fit the profile, according to him.

That is all the information that is in Inspector Serrato's declaration, and all the information that was before him at the time that he decided to detain her; and then she is detained.

Your Honor, the Ninth Circuit has said that when somebody is detained for a search—and this is in a footnote in Ek—the standard that applies is the Dunaway standard. You must have probable cause at that time for the detention.

She is detained on Inspector Serrato's guess that she fits the narcotics profile. Inspector Serrato, who is not trained in the law, doesn't know what the standard [44] is, and she is detained for 16 hours until a court order is sought, 24 hours until it's obtained.

What the government is doing in this case is saying that somebody can be detained on a suspicion for that period of time, and the Ninth Circuit has said that's not true.

You can detain someone for a search, if you have the type of suspicion necessary for the search, only as long as

it takes to conduct that search. Here no search was being conducted, so Dunaway applies, and there must be probable cause or everything goes out.

THE COURT: Let me ask the government:

Is it the government's position that a Customs inspector can make the election, "Either you submit to an X-ray search or you're going home to Colombia"?

MR. NIESEN: I believe the answer—

THE COURT: "And we'll keep you for 30 hours until there's a plane going home to Colombia"?

MR. NIESEN: I believe the answer is that a person entering the United States has an obligation to pass through Customs, to go through a Customs search.

THE COURT: Yes.

MR. NIESEN In this particular case, the Customs inspectors were not satisfied with that search. As a consequence of that, various alternatives were [45] proposed. One of those alternatives was: You can volunteer for your X-ray, and we'll call it quits right there if nothing comes up. The other proposal was: Or go back where you came from, therefore you avoid the problem entirely.

THE COURT. Yes, I understand that's what happened, and I understand that there was not going to be a plane that she could get on for, what?—another 30 hours or something like that?

MR. NIESEN: Well, what occurred was—

THE COURT: I know what occurred: She couldn't stay in Mexico long enough to make the transfer.

But your position is that the discretion is within the expertise and expert discretion of the Customs officers to make that determination, either X-ray or out you go.

MR. NIESEN: I believe that is correct, your Honor. However, at the same time, I would not argue in court that there are not reasonable grounds for that. I would be very uncomfortable arguing in court that we can keep somebody a week while they make this decision or whatever, because they don't want to admit them.

But in this particular case, I think that they acted reasonably. The only reason that she was continued to be detained at that point was to effectuate this [46] decision to send her back to Colombia.

THE COURT: All right, I understand that.

Now, suppose, hypothetically, suppose I'm a Customs inspector, and I see a peron coming across; there are no objective symptoms that I could lay a finger on, but I just have a waving of my antennae in such manner that this person looks suspicious, and I think she may be carrying something in her body.

Therefore, I may say, "X-ray, or out you go"?

MR. NIESEN: Your honor, I'm not sure that would be so. I think that your decision-making would have to stand some objective tests; and before you get an X-ray, you're going to have to make a showing, as the law currently is in this circuit, a clear indication to justify that X-ray search, if you're going to do it involuntarily.

THE COURT: Based upon the initial examination and up to her declination to have an X-ray search, did they make a mistake in saying that would not apply for a warrant?

MR. NIESEN: In my opinion, your Honor, a warrant would have been justified at that point in time. They could have gone for a warrant, had they known that to be an alternative.

THE COURT: If they had so applied under Ek they would be justified in detaining her until the [47] magistrate could act on the warrant.

MR. NIESEN: Certainly.

THE COURT: Now, here, the reason why they would detain her was in awaiting a plane back to Colombia—

MR. NIESEN: That's correct, your Honor.

THE COURT: —until somebody second-guessed the first decision and decided to go for a warrant.

MR. NIESEN: That is what happened, your Honor.

THE COURT: But, of course, in the meantime, a few more things happened: She refused food and water, and

she insisted upon lying down, that sort of thing. But you can't take that into consideration if the initial detention was unjustified.

MR. NIESEN: I would agree, your Honor. There is no doubt that the initial detention would have been legal, because the standard for that is—the threshold is extremely low. It's just basically a suspicion.

THE COURT: So you have to justify the initial detention to send her home before you had all the evidence that was ultimately presented—in order to get all the evidence that was ultimately presented to the magistrate, because some of the things that were a make-wait did not occur until after she had been detained several hours.

NIESEN: All right, let me take it piece by piece. I believe that the initial detention, had it been [48] illegal, would have been fatal.

THE COURT: Okay.

MR. NIESEN: In this particular case, there is no problem.

I believe, then, the decision to detain her, literally—the option would be to let her go, and she just is not clearing Customs. You would have to say that Customs officers, in the discharge of their duties, were not acting reasonably in detaining her until they could get her on the first available flight.

They made those efforts, and during that period of time they observed other things which, again, whetted their belief.

THE COURT: All right. Thank you.

How much longer will you be?

MS. LEVINE: Probably five minutes.

THE COURT: Okay, go ahead.

MS. LEVINE: Your Honor, it's my position that there was no clear indication or probable cause or any grounds to hold Ms. de Hernandez when the strip search was negative. I am not conceding there was cause for a strip search, but, since nothing was found, it's not at issue.

But the facts in this case do not justify a finding of probable cause for the detention, or even clear [49] indication for the X-ray search or the body cavity search that was ultimately performed.

Perhaps—and I'm not going to argue at this point what happened 16 hours later after not eating or drinking.

THE COURT: They had to let her go.

MS. LEVINE: At the first point, they had to let her go.

The the government is arguing, your Honor, is that anybody who comes through that doesn't sit right with them—and that's all they had here, are facts that don't sit right.

THE COURT: So all the cocaine smugglers have to do is get some people that can contain that stuff in their alimentary canals long enough, and send them through, and the Customs have to let them go. They can't detain them.

MS. LEVINE: What I am saying is that the Fourth Amendment applies in a border search situation when it's unreasonable—

THE COURT: In determining reasonableness, can they take into account their knowledge that many people bring those things in in their intestinal canals?

MS. LEVINE: Your Honor, the only knowledge that is before us in any declarations in this case is that [50] the same day another woman came through and was offered the same choice, and went through an X-ray and had nothing in her.

So what they are doing is they are saying, "We have a suspicion. To come in this country, although you have cleared Immigration and gotten your documents, you must give up your Fourth Amendment rights or go home"; and that's not what this—

THE COURT: You're begging the question. I'm concerned about the Fourth Amendment. I'm concerned as to whether or not the detention was unreasonable. We now know that it would have been a travesty to let her go. I know that's ex post facto; we can't consider that.

But the fact of it is, under all the circumstances—and I'm not going to go through them again—it seems to me that, in view of the fact that she refused the X-ray, the government officials could have a substantially grounded suspicion that she may very well have been carrying those balloons.

MS. LEVINE: Your Honor, the question, though, is not founded suspicion; and, at the point she went through, what's clear is only what Inspector Serrato says, and these are the only facts before the Court: that she had the clothing as stipulated to—

THE COURT: I know it. I've read the record.

[51] MS. LEVINE: Your Honor, there's nothing in the facts that says she's nervous, that indicates her answers were inconsistent. All it says is that she's coming from Colombia and she speaks Spanish, so we can hold her until we decide to deport her; and I don't think the law grants that.

The law says if you detain somebody, you must have probable cause to do so or be seeking a court order, and then you must have clear indication to get that court order.

She was not being held to get a court order, and there was no probable cause to hold her.

THE COURT: All right.

MS. LEVINE: Finally, there is one argument I would like to address, and it will probably be a minute and a half.

The government argues in its brief that the detention was justified based on footnote 5 of Couch. As I said before to the Court, Couch is a probable cause or a clear indication case.

But what the government argues is that, in a case where there is no clear indication, in essence, you can hold anyone—or no probable cause, until they have a clear bowel movement.

I would submit to the Court that that is [52] patently absurd.

THE COURT: You'd certainly have to have a lot more restrooms down there, wouldn't you—

MS. LEVINE: And a lot more Customs inspectors.

THE COURT: —and places for detention, and a lot more Customs inspectors.

No, you have to have more than that.

MS. LEVINE: Your Honor, finally, I'd like to address the issue that, in the government's paper it says that Ms. de Hernandez voluntarily consented to deportation. I believe what's been shown to the Court in this hearing is that she was told that she would be deported, and there was no question that she didn't consent or have any choice.

THE COURT: I'm not going to make any ruling on the supposition that she did consent.

MS. LEVINE: I submit it at this time, your Honor.

THE COURT: I'm going to deny the motion to suppress the cocaine that she excreted. It seems to me that, under all the circumstances, the officers were justified in having a very substantial suspicion that this lady may very well be bringing in cocaine, to the point where they were justified in seeking and proposing an X-ray.

Having refused the X-ray, I am of the view—[53] it is my understanding that, under all those circumstances, they were justified in saying, "If you do not agree to an X-ray, we are not obliged to let you go. We will just keep you for a while until, A, we can send you back home; or, B, you have a regular bodily function that might indicate that you are carrying something."

I am putting aside the fact that they did ultimately get a warrant, because several things happened before they even applied for it. If they had no right to detain her as long as they did before that occurred, then they had no right to use the evidence that occurred while they were detaining her.

Under those circumstances, the motion to suppress will be denied.

This is on for tomorrow, isn't it?

MS. LEVINE: Yes, your Honor. It will be a stipulated facts trial.

• • • •

DECLARATION OF KYLE E. WINDES

I, Kyle E. Windes, am a Special Agent of the United States Custom [*sic*] Service and have been for eleven years, declare as follows:

1. On Saturday, March 5, 1983, I was acting as duty agent. At approximately 1:30 a.m. I receive [*sic*] a telephone call from Customs Inspector Olinde. Customs Inspector Olinde told me that a female passenger, recently arrived from Colombia, was believed to be a narcotics courier in that she met the profile developed for "balloon swallowers." Customs Inspector Olinde wanted me to prepare to obtain a court order for medical examination of the passenger.

2. I informed Customs Inspector Olinde that the current policy was to not obtain court orders in such cases and that the passenger must submit voluntarily to examinations by medical personnel, remain in custody until her bowels move and the product of the movement can be examined or depart the United States.

3. At approximately 3:30 a.m. the same date, I was again called by Customs Inspector Olinde and spoke with him and Customs Inspector Tallamantes [*sic*]. They reiterated their prior request and I reiterated my prior answer.

4. On neither of these two occasions did I discuss in any detail the reasons the Customs Inspector had for believing the passenger was a drug courier. My refusal to initiate the process of applying for a court order was based on my understanding of an office policy which applied to these matters.

5. At approximately 12:30 p.m. on Saturday, March 5, 1983, I was called at the office by Allen Walls, the Special Agent in charge. Special Agent Walls told me he had been contacted in the matter of the suspected "balloon swallower" of the night before and suggested that I explore the possibility of obtaining a court order as originally requested.

6. At approximately 1:00 p.m. I phoned Satellite 2 at Los Angeles Airport and spoke with a supervisory inspector. I was told that Customs Inspector Helen Bissen was talking with the passenger and would call me back.

7. I subsequently spoke with Customs Inspector Bissen but was unable to get a clear picture of the circumstances surrounding the matter.

8. At approximately 4:00 p.m. I arrived at Sattellite [*sic*] 2, Los Angeles Airport, spoke with Customs Inspector Bissen and Customs Inspector Talamantes, and examined the effects of the passenger.

9. I then began to prepare an affidavit in support of an application for a court order for medical examination and called for the Duty Assistant United States Attorney. I was subsequently called by Assistant United States Attorney, Brian Sun. I explained the situation to Mr. Sun and discussed the affidavit with him.

10. Assistant United States Attorney Sun believed there were sufficient grounds to request the court order. Assistant United States Attorney Sun began to locate the Duty Magistrate.

11. At approximately midnight on March 5, 1983, I spoke by telephone with Magistrate Giffen. I read to him the affidavit and the draft court order. Magistrate Giffen approved the court order (copies of the affidavit and draft court order are attached as copies to this document).

12. I then called Customs Inspector Talamantes at Los Angeles Airport and told him a court order had been granted. I drove then to County USC Hospital where I met Customs Inspector Talamantes and the passenger, Rosa Hernandez, in the jail ward.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Kyle E. Windes
KYLE E. WINDES
Special Agent
United States Custom Service

I, KYLE E. WINDES, AM A SPECIAL AGENT WITH THE U.S. CUSTOMS SERVICE, U.S. TREASURY DEPARTMENT. I HAVE BEEN A SPECIAL AGENT OF THE CUSTOMS SERVICE FOR ELEVEN YEARS.

THIS AFFIDAVIT IS MADE IN SUPPORT OF AN APPLICATION FOR THE FOLLOWING COURT ORDERS:

1. PREGNANCY TEST
2. IF NOT PREGNANT, A COURT ORDER FOR AN X-RAY EXAMINATION.
3. IF PREGNANT, A COURT ORDER FOR A BODY SEARCH.

I HAVE BEEN ADVISED BY CUSTOMS INSPECTOR EDWARD TALAMANTES OF THE FOLLOWING:

1. HE HAS BEEN A CUSTOMS INSPECTOR FOR THREE YEARS AND WAS ON DUTY AT SATELLITE 2, LOS ANGELES INTERNATIONAL AIRPORT (LAX) ON MARCH 5, 1983, at 0040 hours.
2. AT THAT TIME, HE ADVISED ME, ROSA HERNANDEZ, A PASSENGER ARRIVING ON AVIANCA FLIGHT 080 FROM BOGOTA, COLUMBIA, WAS DETAINED FOR FURTHER CUSTOMS EXAMINATION. PASSENGER WAS REFERRED TO SECONDARY FOR FURTHER EXAMINATION BECAUSE DURING THE INITIAL CUSTOMS EXAMINATION PASSENGER FIT THE SUSPECTED DRUG COURIER PROFILE, EXHIBITED NERVOUS BEHAVIOR.
3. PASSENGER STATED SHE WAS GOING TO STAY AT THE HOLIDAY INN IN LOS ANGELES BUT STATED SHE HAD NO RESENVATIONS [*sic*].
4. PASSENGER PAID APPROXIMATELY $882 CASH FOR HER TICKET, WHICH HAS NO RETURN DATE. SHE IS IN POSSESSION OF approximately [*sic*] $5,000 U.S. CURRENCY WHICH SHE CLAIMED WOULD BE USED TO STAY IN THE U.S. FOR APPROXIMATELY 10 DAYS AND TO PURCHASE

CLOTHES FOR A BUSINESS IN BOGOTA IN WHICH HER HUSBAND IS A PARTNER. WHEN ASKED, SHE COULD NOT REMEMBER WHERE SHE PURCHASED THE AIRLINE TICKET.

5. PASSENGER HAD NO TOILETRY ARTICLES APART FROM A TOOTHBRUSH, TOOTHPASTE, COMB, BRUSH, ROUGE, AND PERFUME. MOST OF HER $5,000 IS IN $50 BILLS. PASSENGER HAS VERY LIGHT LUGGAGE CONTAINING ONLY APPROXIMATELY 4 CHANGES OF CLOTHING. HER ONLY SHOES ARE HIGH HEELS WHICH SHE WAS WEARING. HER RELATIVE LACK OF TOILET ARTICLES, HER LIGHT LUGGAGE, AND HER MONEY BEING IN $50 BILLS INDICATE A "STRIPPED DOWN" OR "CLEAN" APPROACH TYPICAL OF PROFESSIONAL COURIERS.

6. SINCE APPROXIMATELY 1 AM, MARCH 5, 1983, UNTIL 1900 HOURS THE SAME DATE, AFTER A 10 HOUR FLIGHT FROM BOGOTA, PASSENGER HAS REFUSED FOOD AND DRINK AND HAS REFUSED TO VISIT THE TOILET. PASSENGER SITS CURLED UP IN A CHAIR, LEANING TO ONE SIDE.

7. PASSENGER INITIALLY AGREED TO CONSENT TO AN X-RAY BUT THEN STATED SHE WAS 2 MONTHS PREGNANT. PASSENGER THEN AGREED TO CONSENT TO A PREGNANCY TEST BUT WHEN TIME CAME FOR DEPARTURE TO BE TESTED, PASSENGER REFUSED THE TEST. A STRIP SEARCH WAS PERFORMED WITH NEGATIVE RESULTS. INSPECTOR TALAMANTES HAS HAD EXPERIENCE WITH NARCOTICS COURIERS CARRYING DRUGS INTERNALLY, INCLUDING THIRTY PRIOR SEIZURES OF COCAINE FROM BALLOON SWALLOWERS, AND HE BELIEVES THAT PASSENGER ROSA ELVIRA MONTOYA DE HERNANDEZ IS POSSIBLY CARRYING NARCOTICS INTERNALLY. ALL CONVERSATIONS HAVE BEEN

CONDUCTED IN THE SPANISH LANGUAGE IN WHICH TALAMANTES IS FLUENT.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND RECOLLECTION. EXECUTED THIS 6th DAY OF MARCH, 1983, AT LOS ANGELES, CALIFORNIA.

/s/ Kyle E. Windes
KYLE E. WINDES
Special Agent
U.S. Customs Service

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Mag. No. ———

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ, DEFENDANT

ORDER

Upon request of the United States of America and the affidavit of KYLE WINDES, United States Customs Service, and full consideration having been given to the matter, the Court finds that there is a clear indication or plain suggestion that contraband may be located in the body cavities of DEFENDANT (*United States v. Cameron*, 538 F.2d 254 (9th Cir. 1976) and *United States v. Aman*, 624 F.2d 911 (9th Cir. 1980)). IT IS THEREFORE ORDERED:

(1) That DEFENDANT submit to an X-ray examination of the abdominal area. (See Below)

(2) That if such X-ray is positive for a foreign matter in the body cavity that DEFENDANT submit to a body cavity search.

(3) That any medical doctor take whatever means medically safe and appropriate to remove the foreign substance as expeditiously as medically feasible.

(4) That DEFENDANT shall remain in federal custody until the foreign objects are removed from the body.

IT IS FURTHER ORDERED that DEFENDANT is to submit to these medical procedures without resistance. Medical personnel are authorized to use restraint or force

to implement the order as they deem appropriate and reasonable under the circumstances.

United States Magistrate

Dated:

The X-ray and body cavity search is to be conducted only after a medical doctor has approved the use of the X-ray and body cavity search as appropriate for the Defendant and only after the doctor has considered the Defendant's claim that she is pregnant

DECLARATION OF JOSE ANGEL SERRATO

I, Jose Angel Serrato, declares as follows:

1. I am a United States Customs Inspector assigned to the Los Angeles, California, airport. I have been an inspector since June, 1978.

2. On March 5, 1983, I was working secondary, awaiting for the arrival of Avianca Flight 080 from Bogota, Colombia.

3. Passenger Rosa Montoya de Hernandez was referred to secondary for inspection. A routine review of her passport and airline tickets was conducted by myself. I noticed her passport reflected at least eight previous trips to the United States.

4. I asked passenger De Hernandez all pertinent questions for Customs:

a. The purpose of her trip.

b. How long will she stay.

c. Did she have any agricultural products.

d. Did she have $5000 in any currency.

5. I examined her luggage (she had one hand carried bag). I noticed she had cold weather clothes, no extra shoes, no toiletries, and little clothing.

6. After examining her luggage, I summoned Inspector Edward Talamantes to review all documents and I asked for his advice prior to my conclusions. We both acknowledged that she fit the profile for internal narcotics smuggling.

7. I requested a secondary patdown by Senior Inspector Sue Ozawa and Inspector Teddy Mendoza. This result was negative.

8. I then brought all the information to Supervisor Lee Hixon and Walt Olinde, and I advised them that I would like to request an X-ray of passenger De Hernandez. Both supervisors agreed and asked me to ask passenger De Hernandez if she would consent.

9. I asked passenger De Hernandez if she would consent to an X-ray of her abdomen area, and she stated "yes." I asked her if she was pregnant; she stated "yes." I asked her how long and if she was sure, and she stated "about one month. I just saw the doctor before my trip here." I asked her if she would consent to a doctor's examination here to verify her pregnancy; she stated "yes."

10. Before we left to the hospital, I informed passenger De Hernandez that I had to handcuff her hands and tape her pant legs closed. She stated, "You are not going to put those on me. That is an insult to my character. I have never been treated like this before and I have been through Customs many times. Nobody has ever checked me or my bags so thoroughly before. Why do you have to do this?"

11. I told her that it was Customs' policy and within guidelines for her safety as well as ours. I told her anytime we transport anyone in a government vehicle, they have to be handcuffed.

12. Again she refused consent and she stated, "I want to call my husband and tell him what you are doing to me. He knows people in high places here and I am going to have your job. You don't trust me or my word and it's an insult to my character."

13. I then informed both Supervisors Hixon and Olinde that she had refused consent because we had to handcuff her. Both supervisors went to call the duty agent to request a court order.

14. While we were waiting, I told passenger De Hernandez that in this country we are concerned with her well being and as courteous as possible, that I am trying to do my job without making it an insult to you (her). She stated, "You just don't believe me. Just because I am Colombian you think all Colombians are dirty and smuggle. Well, I want to call my husband right now, or I give you the number and you can call and tell him to send my attorney."

15. I told her we cannot call and we have to wait until we hear from the duty agent.

16. The duty agent, Windes, called back and stated that we could not get a court order and for us to stay with her and deport her on the next available Avianca flight, which was two days away.

17. I told passenger De Hernandez that we were unable to obtain a court order from the Magistrate and we were instructed by Agent Windes to hold her until Monday and deport her on the next Avianca flight. She stated, "I would rather die here right now rather than go to the hospital for you. I already have it in my mind that I will not submit to your degradation and I'd rather die." (This taken from my original notes to refresh my memory.)

18. I told passenger De Hernandez that we will stay with her until Monday until we deport her. I told her also that if while she is in our custody, if she discharges anything illegal internally, she will be placed under arrest and transported to a jail ward and be unable to leave the United States. She made no comment.

19. At this time, Senior Inspector Sue Ozawa, Inspector Teddy Mendoza and myself sat up with her in the manifest room until the next morning. At no time did we sleep or lose eyesight of passenger De Hernandez. Passenger De Hernandez sat in her chair clutching her purse.

20. Passenger De Hernandez was not talkative; she did not go to the ladies room; she did not eat or drink anything.

21. The next morning at 0830 hours, I was relieved by day shift and went home.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 21, 1983.

/s/ Jose A. Serrato
JOSE ANGEL SERRATO

DECLARATION OF MARILEE S. MORGAN

I, MARILEE S. MORGAN, declare as follows:

1. I am a Customs Inspector for the U.S. Customs Service, stationed at the Los Angeles, California, Airport. I have been a Customs Inspector since April, 1978.

2. At approximately 9:15 a.m., March 5, 1983, I was asked by Supervisory Customs Inspector Bissen to relieve Customs Inspector Teddy Mendoza in the search room. She was observing Rose Elvira Montoya De Hernandez, a passenger off the March 4 Avianca Flight 80. I was briefed by Senior Inspector Sue Ozawa, being told to sit in the search room and observe Hernandez, while an effort was being made to obtain a court order for a hospital x-ray and then joined by Customs Inspector Jerome Gonzales in the search room to observe Hernandez.

3. Throughout the day Hernandez sat in a chair in the search room, occasionally putting her head down on the table to nap. Customs Inspector Gonzales and I would occasionally converse with her, myself, in very limited Spanish, at times offering her food, drink and bathroom. But she always refused to eat. She also refused the toilet. Since she spoke and understood Spanish only, Customs Inspector Gonzales acted as an interpreter throughout.

4. Several things struck me as being unusual with Hernandez. First of all, each time someone entered the search room, she would take out two small pictures of her children and show them to the person. The pictures were loose, in her purse—not in a billfold or anything. She seemed to make a point of letting us know she had pictures of her children.

5. She had just over $5,000 cash on her. She had one small suitcase with her, filled with her own clothing, and said that she planned to stay at the Holiday Inn near LAX. There were no toilet articles in the suitcase. The only pair of shoes she had were those she was wearing, a pair of spike heels. She gave both Gonzales and myself one of her husband's business cards.

6. Her passport indicated she had made at least half a dozen trips to Los Angeles and Miami.

7. Around 3 o'clock that afternoon Supervisory Customs Inspector Bissen had Customs Inspector Daunis conduct another strip search of Hernandez. After Customs Inspector Daunis completed the strip search, I left the search room for approximately one hour, returning to remain for the duration. I was told by Helen Bisson [*sic*] to go work the passengers.

8. At 4 o'clock Customs Inspector Talamantes relieved Customs Inspector Gonzales who then went home. A few hours later Customs Inspector Britt joined us in the search room. About this time Hernandez complained that she was cold and put on a pair of socks and a sweater. From then on she remained curled up in her chair. Twice she accepted a cup of cola from us but did not drink it. Likewise with some crackers offered her. She took them, opened the pack, but did not eat them.

9. At just after midnight, Customs Agent Kyle Winds [*sic*] obtained by phone permission for a court order to take Hernandez to the hospital. Customs Aid Henry Elizondo tried to read the court order to her but she became very agitated and he had to give up. Then Talamantes explained the situation to her. Talamantes then handcuffed her, assisted by Britt and myself. She strongly resisted and it took all three of us to control her. But once the cuffs were on she suddenly became very docile and gave us no further problems.

10. At about 12:30 a.m. Customs Inspectors Talamantes, Britt, and myself transported Hernandez to USC Hospital. After checking in at the county jail ward, we took her to the women's hospital next door where a sonogram was conducted on Hernandez to determine if she was pregnant. The doctor explained to Britt and me that Hernandez either appeared to have a mislocated uterus or else a double one. Then a urinalysis was conducted. The result of it, given about an hour later, said that she was not pregnant.

11. After the urinalysis, but before its results were known, a pelvic and rectal exam was given by the doctor. At 3:00 a.m. as he was doing the rectal, he made a comment that it appeared she hadn't gone to the bathroom for a long time. Then he said "I think I might have a present for you" and with that comment he pulled out an object, pale yellow in color, tube-shaped. This was witnessed by Britt and myself. I looked at the object and had Britt notify Talamantes was standing outside the room.

12. We then had Hernandez dress and took her out to the van. While standing outside at 3:15 a.m. she was read the Miranda warning in Spanish by Talmantes and then given the rights to read herself. While driving next door to the county jail ward, Talmantes made a comment that Hernandez had just offered him a bribe. He refused it immediately and said that he was performing his job. Talamantes said she had offered to do whatever he wanted with her and split the profit if he wouldn't take her back to the hospital.

13. At 3:35 a.m. Talamantes, at the jail ward, did a field test on the substance found in the balloon. It immediately tested positive for cocaine. Subject was then checked into a room, and at 4:00 a.m. DEA Agent Arthur Johnson was notified and said he would respond. At 4:10 a.m. Hernandez expelled six balloons. Both Britt and myself witnessed it. The six balloons were washed off by Hernandez, placed in an evidence bag, and initialed by both Britt and myself.

14. At 5:05 a.m. DEA Agent Johnson arrived and took a statement from us. Hernandez and evidence were then turned over to him on a chain of custody. Talamantes, Britt, and myself then departed from LAX [*sic*].

I declare under penalty of perjury that the foregoing is true and correct.

MARILEE S. MORGAN
/s/ Marilee S. Morgan

DECLARATION OF JEROME GONZALES

I, Jerome Gonzales, declare as follows:

1. I am an Inspector with the United States Customs and have been working at Los Angeles, California, International Airport for approximately five years.

2. At around 0830 on March 5, 1983, Customs Inspector Morgan and myself were told by Senior Customs Inspector Bissen to replace Customs Inspector Mendoza in the search room, who was sitting with passenger Hernandez. Inspector Morgan did not speak very much Spanish, so I was there to translate only.

3. I sat directly facing the search room with the door open and Inspector Morgan was facing passenger Hernandez opposite the table between them.

4. After reviewing passenger Hernandez's documents, I noticed that she had not initialed the area that shows the amount of money being returned to her. I then asked her why she did not. She felt that by doing so would give us permission to take her to the hospital, which she did not want.

5. I then asked the passenger what gave her the idea that she would be sent to the hospital. According to her, another inspector wanted her signature so that she could be taken to a hospital for an X-ray. She also said that she hardly ever goes to the hospital in her own country, why should she go to one now, now that she was in the United States. She also said that she was pregnant and did not want to harm the unborn child. I explained to her that when we do bring people back to the search room and there is any money found, that it is recorded on a form, to protect us and to make sure that all her money is returned correctly.

6. After explaining this to her, she then went ahead and initialed the section relating to the money verification only.

7. Inspector Morgan and myself had offered passenger Hernandez something to eat, which she refused. She said

that while on the flight to Los Angeles, that she had two meals. The first meal was breakfast leaving Colombia and the second meal was before arriving to the United State. Passenger was also given permission to use the restroom and again refused. Many times at home, she would not use the restroom as often at home [*sic*].

8. A question of her marriage was asked by me, and she said that she was married with two children [*sic*]. One boy was 13, one girl was 12 and a three-year old baby. Passenger produced pictures of the two oldest ones only. She said that there were none of the young one.

9. At this time, she mentioned that all of her children were born at home and not in a hospital. I then asked her how she knew she was pregnant, if she did not like going to hospitals. Her answer was that a doctor had gone to her home to give her the news. At this time, passenger produced the photos of her children.

10. I asked passenger what was the reason for her entering the United States. Her reply was to purchase goods to send home (Colombia) to a store that her husband owned interest [*sic*] in with a friend. I asked her what kind of merchandise she would be purchasing. She said clothes, shoes and anything in general that could be sold.

11. What stores would she be purchasing these goods from, was my next question. She said stores like K-Mart, J. C. Penney, Broadway or Sears.

12. She then showed Inspector Morgan and myself a business card with a company, "Gus Gar" or Gar Gus" appeared.

13. I then asked her if she had any appointments set up to visit any buyers, which she sad "no" to; that she would take a taxi to the stores mentioned and buy right there on the spot. She also said that she did not know anyone here in the United States, but had been in the states before to purchase goods in the past.

14. At around 1400-1430, Senior Customs Inspector Bissen asked me to tell Hernandez that Customs would be sending her back to her country on the first available

flight back to Mexico City, where she could catch a flight back to Colombia.

15. Senior Customs Inspector Bissen also instructed me to ask passenger if she was married, to which she said "yes." Senior Customs Inspector Bissen asked me to ask the passenger if she had any children, to which she said "yes" and once again produced pictures and was crying. Senior Customs Inspector Bissen asked me to ask the passenger when she had purchased her ticket for the flight here, and she said it was from a travel bureau. Senior Customs Inspector Bissen asked me to ask the passenger what was the date that she purchased her ticket, and she said something not clear and then said that she could not remember. Senior Customs Inspector Bissen then asked me to ask the passenger how much currency the passenger was carrying. The passenger said she was carrying about $5,000 in cash only.

16. Senior Customs Inspector Bissen then asked Customs Inspector Morgan to look for the passenger's luggage and to return with it to the search room. When the passenger's bags were brought to the search room, Senior Customs Inspector Bissen and Customs Inspector Morgan looked through the passenger's bags, containing a few personal pieces of clothing, like underwear, pants and blouse. There were no articles of toiletries nor any extra footwear. Also there was a photo album inside along with the clothing. It contained a few purchasing receipts and an airline airway bill which showed that merchandise had been sent to the United States before.

17. At around 1500, Customs Inspector Daunis entered the search room, and at the same time, Senior Customs Inspector Bissen instructed me to tell the passenger that another patdown would be done on her. I also told the passenger that they were doing this one more time. The passenger was willing to go through with this again.

18. After the patdown was completed, I once again entered the search room. Senior Customs Inspector Bissen told me to ask the passenger why she had some half folded paper towels placed in her underwear. The passenger said that since she was pregnant, her body was discharging fluids. That that was the reason for the paper towels placed where they were at. This is what I then told Senior Customs Inspector Bissen.

19. Inspector Daunis replaced Inspector Morgan in the search room. I also stayed for any further translations for passenger Hernandez.

20. Again Senior Customs Inspector Bissen entered the search room with instructions to tell the passenger that there would be a delay in getting her a flight out of Los Angeles, because of bad weather conditions. The passenger did not take the information too well and started to cry, saying that she did not want to stay in the states, that she wanted to go home. Senior Customs Inspector Bissen told me to tell the passenger that should there by [*sic*] any further cancellation of flights, that she would have to stay in the search room until Customs was able to arrange a flight for her departure. The passenger replied that she understood. Senior Customs Inspector Bissen told me to tell the passenger that she would continue to check on other flights and would return.

21. After Senior Customs Inspector Bissen left the search room, the passenger asked me if she could make a phone call home so that she could talk to her children and to let them know that everything was all right. I told the passenger that I would ask. Thereafter Senior Customs Inspector Bissen returned to the search room which [*sic*] and I then relayed the passenger's request. Senior Customs Inspector Bissen said "no" to the passenger's phone call.

22. The passenger then told me that if we needed to, that she would give us permission to use her money, so that we could purchase a ticket to Mexico City, which were the only flights leaving the states. Senior Customs

Inspector Bissen said "okay," that she would check once again about available flights.

23. Again I asked the passenger if she wanted anything to eat since she had not eaten in a while, and she said "no." I asked her if she wanted to use the restroom, and she said "no."

24. Senior Customs Inspector Bissen again re-entered the search room telling me to inform the passenger that she did not have a "visa" to stay in Mexico City to catch another flight home; that this would cause some problems while in Mexico. Senior Customs Inspector Bissen told me to tell the passenger that there was a late flight on Avianca going directly to Colombia at 2200, and would try to get the passenger on that flight.

25. The passenger again told me that we could use her money to purchase her a ticket. Once again I relayed this to Senior Customs Inspector Bissen.

26. At around 1600, Custom Inspector Morgan returned to the search room to replace Customs Inspector Daunis whose shift ended at 1600. Inspector Talamantes also replaced me.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 21, 1983.

/s/ Jerome Gonzales
JEROME GONZALES

DECLARATION OF TEODORA A. MENDOZA

I, Teodora A. Mendoza, declare as follows:

1. My name is Teodora A. Mendoza and I am an Inspector with United States Customs. I have had the position for approximately 7½ years, since September, 1975. On the evening of the incident, I was assigned to an overtime job at Satellite # 2, Los Angeles, California, International Airport, beginning at 5:00 p.m. until the last flight was finished. The following narrative was prepared by me on the following Monday morning, in reference to what took place on the morning of March 5, 1983.

2. On Saturday morning (March 5, 1983), at approximately 0025 hours, Avianca 080 arrived, carrying among its passengers, Ms. Montoya de Hernandez.

3. Upon a request from Inspector J. Serrato, Senior Inspector S. Ozawa and myself escorted said passenger into a search room for a pat down. Upon pressing her abdomen and stomach area, she felt hard and also as if she was wearing a girdle. I indicated for her to open her slacks and to pull them down. This revealed that she was wearing two pairs of elastic-like panties. She then pulled these down to expose a paper towel placed in the crotch area to absorb what seemed to be a vaginal discharge. I motion for her to pull her clothing back up and fasten the slacks.

4. Senior Inspector S. Ozawa counted her money and passenger had $5041.00 as she had indicated on her Customs Form 4790 ($5,000.00).

5. Passenger was then escorted back to the passenger belt so Inspector Serrato could explain to her, in Spanish, that she could initial the Search Report form indicating that she had received her money back.

6. Inspector Serrato then explained to the passenger that we would like to take her to the hospital for an x-ray and at first she consented. Then when Inspector Serrato and myself approached her with handcuffs and tape (for

the pant legs), she crossed her arms by her chest and began stepping backwards shaking her head negatively. When Inspector Serrato stepped forward explaining to her the necessity of the items, she looked as if she would strike him. He then stepped back and tried to convince the passenger of our motives.

7. Passenger now refused the x-ray and Supervisory Customs Inspector Hixon called Sector (Office of Investigation) to get an agent so we could try to obtain a court order.

8. A short while later, SCI Hixon returned telling us that the agent said that if the passenger wouldn't cooperate, we could "deport" her on the next plane to her country, Colombia.

9. Inspector Serrato and myself then escorted the passenger to a room where we would sit and wait until arrangements could be made for her return trip. As he was leaving, SCI Hixon found a Lacsa Airline agent who said they had a flight which departed at 3:00 a.m. for Mexico with a connecting flight to Colombia, but as their flight out of Mexico was fully booked, they were unable to take said passenger since she had no visa for Mexico and could not be held there until their next flight.

10. Lacsa advised us to try to book her for the following night. Passenger was informed in Spanish by Inspector Serrato of her impending "deportation" and was quite agreeable saying she would buy her return ticket if Avianca would not endorse her return ticket by their airline.

11. Passenger stayed awake all night long, refusing food, drink or toilet facilities. Passenger had been instructed that if she had to eliminate bodily wastes, she would be escorted to the female employees' restroom, but rather than use the toilet, she would have to eliminate in a waste paper basket. The purpose of this was to prevent passenger from flushing toilet before Senior Inspector Ozawa or I could prevent it and so we could see if there were any "foreign objects" in the waste material. Passenger remained in chair throughout the night without speaking or causing any disruption. Most of the time the passenger sat with her legs crossed and her body shifted over to one side or the other. Passenger had also claimed pregnancy as per Inspector Serrato.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 21, 1983.

/s/ Teodora A. Mendoza
TEODORA A. MENDOZA,
Inspector #13653

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 83-215-WPG

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROSA E. M. DE HERNANDEZ, DEFENDANT

STIPULATION RE TRIAL AND ORDER THEREON

IT IS HEREBY STIPULATED by and between the defendant Rosa E. M. De Hernandez and plaintiff, United States of America, by and through their respective attorneys, that the following facts would be elicited through testimony by the United States in the trial of this matter and such facts are to constitute the trial record.

STEPHEN S. TROTT
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

JEFFREY S. NIESEN
Assistant United States Attorney
Attorneys for Plaintiff,
United States of America.

/s/ Janet J. Levine
JANET LEVINE,
Deputy Federal Public Defender,
Counsel for defendant,
Rosa E. M. De Hernandez.

/s/ Rosa E. M. De Hernandez
ROSA E. M. DE HERNANDEZ,
Defendant.

ORDER

IT IS SO ORDERED.

Dated: April —, 1983.

United States District Judge

III

STATEMENT OF FACTS

In the early morning of March 5, 1983, Avianca Flight #80 arrived at Los Angeles International Airport from Bogota, Colombia. Among the deplaning passengers was the defendant, Rosa E. M. De Hernancez (hereinafter Hernandez). After presenting her passport, and passing through immigration, she proceeded to Customs.

At Customs, she presented her Custom declaration and passport to Customs Inspector Talamantes. After a cursory inspection of her documents, the inspector referred her to "secondary" for a more thorough examination. At secondary, she was met and questioned by Customs Inspector J. Serrato.

Inspector Serrato inspected her passport, declaration and airline ticket. He asked her a number of questions. On the basis of her responses and general demeanor, he concluded, together with Inspector Talamantes, that Hernandez fit the profile of persons suspected of carrying drugs concealed in their bodies. The factors which led to that conclusion were as follows:

1. Hernandez was on a short trip;
2. She could not speak English;
3. She had no family or friends in the United States;
4. She was coming to buy merchandise and clothes from various shops;
5. She would visit the stores by taxi;
6. She had minimal luggage and had with her one pair of spiked heeled shoes which she wore;
7. She lacked toilet articles;
8. She carried no billfold yet had over $5000 of currency; and
9. She came from a narcotic source country.

Inspector Serrato summoned Senior Inspector Susan Ozawa and requested a patdown search. Upon reviewing the fact, Ozawa had Hernandez escorted into a search

room. There Inspector Mendoza conducted a patdown search. Upon discovering a firmness about the pelvic area, Hernandez was told to unzip her pants. Inspection revealed two pairs of elastic panties and a paper towel in the crotch area. She was then told to get dressed. Ozawa reported to Serrato that the search was negative.

At that point Serrato asked Hernandez whether she would agree to an X-ray of her stomach. She said "yes." She also indicated she was pregnant but agreed to have a pregnancy test. After being told that she would have to be transported to the hospital in handcuffs, she withdrew her consent.

Supervisory Inspector Olinde was asked to contact the Customs Special Agents to obtain a court order for the body cavity X-ray. Contact was made with Special Agent Kyle E. Windes. After being advised by Olinde that a court order was desired, the special agent informed Olinde that current policy was not to obtain such orders. He explained the alternatives to be (a) a voluntary consent to X-ray (b) keep the passenger in custody until her bowels move and the result examined, or (c) have her depart the United States back to Colombia. Windes made no attempt to contact either the United States Attorney's Office or a Magistrate about the case.

Serrato was advised that Hernandez would be detained until she could be sent on a departing flight. He told Hernandez that she would be sent out on the next available Avianca flight and that until then she would be watched by Customs officers. He also told her that if she passed any narcotics during that period she would be arrested.

During the night, efforts were made to get Hernandez aboard a LACSA flight to Mexico with connections to Colombia. The airline refused to take her since she had no visa for a Mexico stop. Hernandez was agreeable to her "deportation" and even offered to pay for the ticket if her return ticket on Avianca was not endorsable.

Hernandez spent the remainder of the night with Serrato, Ozawa and Inspector Mendoza in the manifest room. Hernandez sat in a chair. She did not eat, drink or use the rest room. Serrato was relieved at 8:30 a.m. the next morning by Inspectors Gonzales and Morgan. It was anticipated that Hernandez would be sent back to Colombia aboard an Avianca flight due to leave that evening.

Inspectors Gonzales and Morgan continued the surveillance throughout the next day. Despite numerous requests and offers, she continued to refuse to eat, drink or use the rest room. She spoke of her family, and the reason for her visit to the United States. At 3:00 p.m. she was again pat and semi-stripped searched. This was to insure the safety of the surveilling officers. The result was again negative.

At approximately 4:00 p.m., Special Agent Windes arrived at the area where Hernandez was being detained. After being briefed, about 5:00 p.m. he contacted the United States Attorney's Office to obtain an order for an X-ray search. In support of this request, the Special Agent in addition to the other factors noted above, relied on the fact that Hernandez during the detention, failed to use the rest room, eat or drink. Also noted was Hernandez's posture in leaning in the chair she was sitting. At approximately midnight March 5, 1983, Windes spoke to Magistrate Geffen who granted an order for a pregnancy test and body cavity search.

At that point, Hernandez had been under Customs supervision and detention for about 24 hours.

At 12:30 a.m. March 6, 1983, Hernandez was escorted to USC Medical Center hospital for the medical test and examination. At about 1:30 a.m. a pregnancy test was administered and a rectal examination was performed. Dr. Lewengood, conducting the examination, removed a ballon-shaped object from her rectum. Hernandez was not pregnant.

After she dressed, Hernandez was placed under arrest and advised her of her Miranda rights. At 4:00 a.m., a

room at the hospital was obtained and DEA notified. Over the next four days, Hernandez excreted at total of 88 balloons. The balloons contained a total of 528.4 grams of 80 percent 1-cocaine, a schedule II controlled narcotic.

Late in the evening on Thursday, March 11, 1983, Hernandez was released by the doctor upon his confirmation that she had passed all the balloons. That evening she was taken to Sybil Brand Jail and the next day arraigned before Magistrate Tassopulos.

SUPREME COURT OF THE UNITED STATES

No. 84-755

UNITED STATES, PETITIONER

v.

ROSA ALVIRA MONTOYA DE HERNANDEZ

ORDER ALLOWING CERTIORARI

Filed January 21, 1985

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

Justice Powell took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 470279 11081

No. 84-755

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether respondent, who was reasonably suspected of attempting to smuggle contraband drugs carried within her body and who refused to submit to an X-ray, could lawfully be detained at the border by Customs officers for the period of time necessary to examine her bodily wastes.

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UNITED STATES OF AMERICA, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 731 F.2d 1369. The district court's oral ruling denying respondent's suppression motion (Pet. App. 13a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1984. A petition for rehearing was denied on August 10, 1984 (Pet. App. 15a). On October 3, 1984, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 8, 1984. The petition was filed on that date and was granted on January 21, 1985. J.A. 66. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Central District of California, respondent was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and unlawful importation of cocaine, in violation of 21 U.S.C. 952(a) and 960(a)(1). She was sentenced to concurrent terms of two years' imprisonment to be followed by a three-year special parole term. A divided panel of the court of appeals reversed respondent's convictions (Pet. App. 1a-12a).

1. This case involves an instance of alimentary canal smuggling, a technique used with increasing frequency to smuggle narcotics into this country. A typical alimentary canal smuggler is a non-American who is hired to carry narcotics into the United States in his or her digestive tract. While in the foreign country, the smuggler first takes laxatives to empty his digestive system. He then swallows balloons or capsules containing cocaine or another illegal drug, and takes a substance that inhibits the functioning of his digestive system. After the smuggler enters the United States, he ingests laxatives and excretes the balloons containing the narcotics. See Pet. App. 10a (Jameson, J., dissenting); *United States* v. *Vega-Barvo*, 729 F.2d 1341, 1350 (11th Cir. 1984), petition for cert. pending, No. 84-5553; *United States* v. *Mejia*, 720 F.2d 1378, 1380 n.1 (5th Cir. 1983); *United States* v. *Couch*, 688 F.2d 599, 605 (9th Cir. 1982).

2. The evidence, which is summarized in the opinion of the court of appeals (Pet. App. 2a-4a), showed that shortly after midnight on March 5, 1983, respondent arrived at the Los Angeles airport on a flight from Bogota, Colombia. After passing through an immigration checkpoint, she proceeded to a Customs inspection area where, following a review of her travel documents, she was directed to a secondary inspection area for a more thorough examination. *Id.* at 2a; J.A. 62.

Customs Inspector Jose Serrato reviewed respondent's passport, inspected her luggage, and questioned her about her trip to the United States. Examination of her travel documents revealed that respondent was from Colombia, a source country for narcotics, was on a trip of short duration, and carried approximately $5,000 in American currency. In addition, respondent previously had made many short trips to the United States, sometimes to Miami and sometimes to Los Angeles. Upon questioning, respondent, who spoke no English, revealed that she had no confirmed hotel reservations and no family or friends in the United States. She could not recall where she had purchased her airline ticket. Pet. App. 2a n.3; J.A. 41-42, 46, 62; E.R. 40.[1]

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[1] E.R. refers to the excerpt of record filed in the court of appeals.

A few of these facts are contained only in the statements of the Customs officers that were attached to the application for a court order authorizing an X-ray and body cavity search

Respondent asserted that she had come to the United States to purchase clothing and appliances for her husband's retail business in Colombia and displayed business cards and a book of invoices to substantiate this claim. J.A. 14-15. She explained that she planned to take a taxi to various retail stores to purchase the merchandise on the spot. J.A. 62; E.R. 40. Serrato noticed that although respondent had $5,000 in cash she carried no billfold. Moreover, she had no shoes except the spiked high heels that she was wearing, and she carried little extra clothing.[2] After consulting with another Customs officer, Ser-

(see pages 6-7, *infra*). Those statements were included as attachments to respondent's motion to suppress, and therefore were before the district court in connection with its consideration of that motion. Although respondent lodged an objection on hearsay grounds to the district court's consideration of some of these facts (J.A. 11), both the district court and the court of appeals appear to have relied upon the statements in assessing whether the officers were justified in detaining respondent (see J.A. 10-11; Pet. App. 2a n.3). Of course, the Federal Rules of Evidence, including the hearsay rule, do not apply to suppression hearings. Fed. R. Evid. 1101(d)(1); see, *e.g.*, *United States* v. *Matlock*, 415 U.S. 164, 174 (1974); *United States* v. *Merritt*, 695 F.2d 1263, 1269-1270 (10th Cir. 1982), cert. denied, 461 U.S. 916 (1983). The reliance upon this evidence by the courts below therefore was perfectly proper.

[2] During the suppression hearing, the parties stipulated that respondent's purse contained the following items: a make-up bag containing lipstick, mascara, rouge, mirror, eye liner, and eye shadow; perfume; hand cream; toothbrush; toothpaste; hairbrush; handkerchief; pictures of two children; a pen; and some U.S. currency. Her suitcase contained a nightgown, a 500-peso note, a pair of jeans, three blouses, three pairs of slacks, one green two-piece suit, assorted underwear and socks, two sweaters, and a brown skirt. J.A. 9.

rato concluded that respondent probably was carrying drugs internally because she exhibited characteristics that, in the experience of Customs inspectors, are common to persons who smuggle drugs in their alimentary canals. Pet. App. 2a n.3; J.A. 46, 62.

Serrato then arranged for a female Customs officer to conduct a patdown search of respondent. After escorting respondent to a search room, the female officer conducted the search and discovered a firmness in respondent's pelvic area. After directing respondent to unzip her pants, she observed that respondent was wearing two pairs of elastic underpants and had placed a paper towel in her crotch area. No contraband was discovered during this procedure. J.A. 57, 62-63. The Customs officers then asked respondent whether she would consent to an X-ray and, although she claimed she was pregnant, she initially gave her consent. Respondent withdrew her consent, however, when informed that she would be handcuffed while being transported to the hospital for the X-ray. Pet. App. 3a; J.A. 47, 63.

The officers on duty at the airport then requested that Customs Special Agent Kyle E. Windes seek a court order for an abdominal X-ray. Windes declined to do so and instead directed that respondent be afforded the options of consenting to an X-ray, remaining in custody until she had a bowel movement, or returning to Colombia on the next available flight.[3] Pet. App. 3a; J.A. 39, 48, 63. Given these choices, respondent opted to return to Colombia. The officers

[3] At this time the Ninth Circuit already had decided *United States* v. *Ek*, 676 F.2d 379 (1982), in which it stated that more than reasonable suspicion is required to justify a nonconsensual X-ray.

advised her that she would be kept under observation until her departure and that she would be arrested if she excreted any narcotics during that period. J.A. 48, 63.

Respondent was detained in a room at the airport while she waited to be placed on a return flight to Colombia.[4] Under the continuous observation of Customs officers, respondent remained in the room throughout the night and most of the next day, refusing to eat, drink, or empty her bowels. For most of this period, respondent sat curled up in a chair, leaning to one side. Pet. App. 3a-4a; J.A. 48, 49-50, 52-53, 58, 64.

At approximately 3:00 p.m. on March 5, female officers subjected respondent to a second search, which again failed to reveal evidence of contraband (Pet. App. 3a; J.A. 50, 64). One hour later, Agent Windes arrived at the airport and, after consulting with the Customs officers on the scene and with an Assistant United States Attorney, decided to seek a court order authorizing a pregnancy test, an X-ray, and an internal body cavity search. Agent Windes's affidavit in support of the court order summarized the Customs officers' observations of respondent, including her refusal of food and drink and failure to use toilet facili-

[4] As it happened, the next direct flight to Colombia was many hours away (J.A. 19, 48). During the course of respondent's subsequent detention, however, Customs officers attempted to arrange for her departure to Mexico City, where it was believed she could catch a connecting flight to Colombia. These arrangements were thwarted by poor weather conditions and by the discovery that respondent did not have a visa for Mexico and thus could not wait there until the next connecting flight to Colombia. J.A. 53-54, 55-56, 58, 63-64.

ties for a 16-hour period. J.A. 40-43, 64.[5] At approximately midnight, a federal magistrate issued an order authorizing an X-ray of respondent's abdominal area and a body cavity search. The order provided that the X-ray and body cavity searches were to be conducted "only after the doctor has considered [respondent's] claim that she is pregnant." Pet. App. 3a-4a; J.A. 40, 44-45, 64.

At 12:30 a.m. on March 6, 1983, respondent was taken to the University of Southern California Medical Center, where a test showed that she was not pregnant. A rectal examination revealed a balloon containing cocaine. Respondent was then placed under arrest and taken to a room in the prison ward of the hospital. Over the next four days, she excreted 88 balloons containing more than half a kilogram of cocaine. Pet. App. 4a; J.A. 50-51, 64-65.

2. Prior to trial, respondent moved to suppress the cocaine (E.R. 15-27). She argued, inter alia, that the affidavit supporting the court order for the body cavity search was tainted by information obtained during an unlawful detention (E.R. 20-23).

The district court denied the motion (Pet. App. 13a-14a). The court acknowledged that, because the court order was based on information gleaned during the course of respondent's detention, the validity of the court order turned on the validity of the detention (*id.* at 14a). The court pointed out that after the Customs officers initially questioned respondent, they had "a very substantial suspicion" that she was smuggling narcotics concealed inside her body (*ibid.*;

[5] The affidavit also noted that respondent's "relative lack of toilet articles, her light luggage, and her money being in $50 bills indicate a 'stripped down' or 'clean' approach typical of professional couriers" (J.A. 42).

J.A. 10-11). The court concluded that the officers therefore were justified in seeking respondent's consent to an X-ray examination and, upon her refusal to consent, in detaining her until she either could be placed aboard a return flight to Colombia or had a bowel movement that would confirm or negate the officers' suspicions (Pet. App. 14a).

3. A divided panel of the court of appeals reversed (Pet. App. 1a-12a). The court did not question the sufficiency of the information supporting the court order authorizing the search of respondent's body cavity. It held, however, that the information underlying the court order, which included observations of respondent's suspicious behavior while detained, was the fruit of an unlawful detention of respondent, and that the cocaine therefore should have been suppressed.

The majority acknowledged that the Customs officers "had limited options in the face of their strong belief that [respondent] was a drug courier. They could let her into the country and try to follow her; they could seek a court order for an X-ray without undue delay; or they could detain her until nature took its course" (Pet. App. 6a). In concluding that the officers' choice of the latter option was unreasonable, the majority found that at the time the officers decided to detain respondent they lacked the level of suspicion necessary to obtain a court order for an X-ray search under the Ninth Circuit's recent decision in *United States* v. *Quintero-Castro*, 705 F.2d 1099 (1983)—a "clear indication" that respondent was engaged in alimentary canal smuggling (Pet. App. 6a). In these circumstances, the majority reasoned, the facts known to the officers likewise did not justify the period of detention, which the court characterized as involving "many hours of humiliating discomfort," for the purpose of examining respondent's bowel movements (*id.* at 5a-6a).

Judge Jameson dissented (Pet. App. 8a-12a). He noted that even though respondent "may have suffered 'many hours of humiliating discomfort,' she was herself solely responsible for a considerable part of it" (*id.* at 9a). Judge Jameson concluded that he "would permit reasonable detentions at the border for the purpose of observing persons suspected of alimentary canal smuggling so long as the detention is based on a real suspicion sufficient to justify a strip search" (*id.* at 11a).

In the view of the dissent, the detention here, although lengthy, was less intrusive than either a body cavity or an X-ray search, as to which the Ninth Circuit had imposed the more rigorous "clear indication" standard. Addressing the reasonableness of detaining persons reasonably suspected of smuggling narcotics in their bodies, Judge Jameson observed that "indications of alimentary canal smuggling can only be observed *over a period of time*. Allowing a reasonable period of detention, based on a real suspicion, is the least intrusive and most reliable means of identifying alimentary canal smugglers." Pet. App. 10a-11a (emphasis in original; footnote omitted).[6] Finally, he observed that "[t]o deny the va-

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[6] Judge Jameson stated "[a]s a practical matter * * * a detention would not be necessary if customs officials could seek a court order for an X-ray on the basis of a 'real suspicion'" (Pet. App. 11a n. 3). He noted, however, that the court of appeals had "adopted the higher 'clear indication' standard for X-ray searches" and that, although "the wisdom of this decision may be questioned, * * * it is the law of the circuit" (*ibid.*).

lidity of reasonable detentions would reward the increasing ingenuity of narcotics smugglers and seriously hamstring the good faith efforts of customs officials to stem the flow of illegal narcotics across our borders" (*id.* at 12a).

SUMMARY OF ARGUMENT

This Court has consistently recognized that searches and seizures conducted at the border have a special status under the Fourth Amendment. For example, a search of the luggage of a traveler seeking to enter the United States is permissible on the basis of nothing more than the Customs officer's subjective suspicion that something is amiss. After the traveler has entered the country, a search of that type generally would be proper only if justified by probable cause. The government's compelling interest in protecting the territorial integrity of the nation against the unlawful entry of persons and contraband, and the substantially limited privacy and liberty interests of persons seeking admission into the country, especially aliens such as respondent, mandate the application of a relaxed standard of reasonableness in assessing government action in the border context.

This case presents the question of the application of this reasonableness standard to the detention at the border of persons who are reasonably suspected of attempting to enter the country with illegal narcotics concealed in their stomachs. Customs officers can confirm or dispel a suspicion that someone is engaged in this type of smuggling only by subjecting the suspect to an X-ray search or detaining him until his natural processes reveal the contents of his digestive tract. It is our contention that a Customs officer may detain a person for this purpose if the officer has formed a

reasonable suspicion, based upon objective, articulable facts, that the suspect is carrying contraband.

When a suspect is detained at the border to enable Customs officers to conduct a search, the propriety of the detention should turn on the lawfulness of the search that necessitates the detention. The detention of a suspected alimentary canal smuggler therefore is proper if the Customs officers may lawfully search the suspect's bowel movements. The intrusion upon the suspect's privacy interests resulting from a search of this type certainly is no greater than the indignity accompanying a strip search. The courts of appeals are in general agreement that a strip search is proper if a Customs officer has a reasonable suspicion that the suspect is carrying contraband, and the same rule should apply in this context. In order to search a suspect's bowel movements, it is of course necessary to detain the suspect until he moves his bowels. This circumstance does not support a requirement of a higher quantum of suspicion, however, because the length of the detention is almost entirely within the suspect's control. And, of course, an individual who finds such a detention and search particularly offensive always has the ability to avoid the detention and search by consenting to an X-ray.

The court below concluded that the detention of a suspected alimentary canal smuggler is lawful only if the facts available to the Customs officer satisfy a more stringent test—if they provide a "clear indication" that the suspect is an alimentary canal smuggler. That rule is incompatible with the relaxed reasonableness standard that applies in the border context. Moreover, it would prevent Customs officers from detaining persons about whom, in the court of appeals' own words, there is a "justifiably high level

of official skepticism" (Pet. App. 5a). The government should be free to utilize reasonable investigative techniques, such as the detention in this case, in order to apprehend persons attempting to smuggle illegal drugs across our national borders. This is especially so in the case of aliens, such as respondent, who have substantially reduced expectations of privacy and liberty when seeking admission into this country. Since a detention at the border of the type at issue here does not infringe upon these limited expectations, it does not violate the Fourth Amendment.

The facts available to the Customs officers in the present case, which are characteristic of alimentary canal smuggling efforts, were more than ample to support a reasonable suspicion that respondent was engaged in smuggling. Respondent arrived from Colombia, a key source country for narcotics, and previously had made many short trips to the United States. She had no friends or relatives in the United States, no hotel reservations, and did not know where her ticket had been obtained. Respondent claimed that she was planning to purchase supplies for a retail store but had no concrete plans other than her intention to get to the stores by traveling around in a taxi. Moreover, when subjected to a strip search, respondent was found to have an unusual arrangement of undergarments suggestive of alimentary canal smuggling. The Customs officers properly recognized these facts as substantial indicia of alimentary canal smuggling. They therefore were justified in detaining respondent in order to verify or dispel the suspicion that she was engaged in such smuggling.

ARGUMENT

THE DETENTION AND SEARCH OF RESPONDENT AT THE BORDER DID NOT VIOLATE THE FOURTH AMENDMENT

The issue in this case is whether a person who is reasonably suspected of carrying illegal drugs in her alimentary canal, and who refuses to consent to an X-ray, may be detained at the border for the time necessary to verify or dispel that suspicion by examining her body wastes. A detention for this purpose falls within the broad statutory authority of Customs officers to detain and search persons seeking to enter the country in order to prevent the importation of contraband. See 19 U.S.C. 482, 1467, 1581, 1582; 19 C.F.R. 162.6, 162.7; see also page 15 note 7, *infra*. In our view, it is similarly clear that such a detention is reasonable under the Fourth Amendment standard governing searches and seizures at the border.

A. The Government May Detain At The Border A Person Reasonably Suspected Of Alimentary Canal Smuggling For The Time Necessary To Verify Or Dispel That Suspicion

1. The inquiry in assessing a search or seizure under the Fourth Amendment focuses upon "the 'reasonableness' of the type of government intrusion involved." *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 9; see also *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 10; *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 6-7; *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968). Viewed from a different perspective, the inquiry considers the extent to which society recognizes and affords the individual a privacy or liberty interest in the particular circumstances in which the

government action occurs. See *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5; *Smith* v. *Maryland*, 442 U.S. 735, 739-741 (1979); *United States* v. *Miller*, 425 U.S. 435, 442 (1976); *Katz* v. *United States*, 389 U.S. 347 (1967). As the Court explained in *New Jersey* v. *T.L.O.*, slip op. 10 (citation omitted):

> [W]hat is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails."

The reasonableness of many types of searches and seizures is measured by the standard of probable cause, but the Court has found that in some circumstances the balancing of relevant factors mandates the use of a relaxed standard for determining reasonableness. See, *e.g.*, *New Jersey* v. *T.L.O.*, slip op. 14; *Michigan* v. *Long*, 463 U.S. 1032 (1983); *Michigan* v. *Summers*, 452 U.S. 692 (1981); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976); *Terry* v. *Ohio*, *supra*.

It is axiomatic that such a relaxed reasonableness standard applies to searches and seizures at the border. The government has a uniquely important interest in stopping and searching persons at the border in order to prevent the entry into this country of unauthorized persons and goods. This interest stems from the inherent authority of a sovereign to protect its territorial integrity and is reflected in the power granted Congress "[t]o regulate Commerce with foreign Nations * * *" (Art. I, § 8, Cl. 3). Congress has sought to prevent the importation of contraband by granting Customs officers broad authority to stop and

search persons attempting to enter the country.[7] See *Torres* v. *Puerto Rico*, 442 U.S. 465, 472-473 (1979); *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977); *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 125-126 (1973); *Carroll* v. *United States*, 267 U.S. 132, 154 (1925).

In *United States* v. *Ramsey*, the Court approved the opening of a letter found to contain heroin that was mailed from a foreign country, although the Customs inspector had not obtained a warrant and did not have probable cause to believe that the letter contained contraband. The Court held (431 U.S. at 619 (footnote omitted)):

> Border searches * * * from before the adoption of the Fourth Amendment, have been considered to be "reasonable" by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence

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[7] Several statutes authorize detentions and searches of persons at the border. See 19 U.S.C. 482, 1467, 1581, 1582. For example, Section 1582 provides:

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

Section 1582 has been implemented by regulations broadly authorizing stops and searches of persons seeking to enter the United States. See 19 C.F.R. 162.6, 162.7. The use of this authority by Customs officers is governed by mandatory guidelines issued by the Commissioner of Customs.

> of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless "reasonable" has a history as old as the Fourth Amendment itself. We reaffirm it now.

Ramsey's conclusion that the probable cause standard and the requirement of a warrant do not govern the reasonableness of searches at the border applies to searches and detentions of persons. See 431 U.S. at 616. As the Court observed in *Carroll* v. *United States*, 267 U.S. at 154, persons lawfully within the country "have a right to free passage without interruption or search unless there is * * * probable cause," but "[t]ravellers may be * * * stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." See also *Torres* v. *Puerto Rico*, 442 U.S. at 472-473; *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 887 (1975) (Rehnquist, J., concurring); *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 62-63 (1974); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973); *id.* at 288 (White, J., dissenting); cf. *United States* v. *Martinez-Fuerte*, *supra*.

In order to evaluate the propriety of searches and detentions of persons at the border, it is necessary to balance "the individual's legitimate expectations of privacy and personal security" against the government's compelling interest in effectively policing our national borders.[8] Cf. *New Jersey* v. *T.L.O.*, slip op.

[8] This already substantial government interest is heightened in the circumstances of this case because " '[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit.' " *United States* v. *Place*,

10; see also *United States* v. *Hensley*, No. 83-1330 (Jan. 8, 1985), slip op. 6; *United States* v. *Place*, slip op. 6-8; *United States* v. *Martinez-Fuerte*, 428 U.S. at 555; *United States* v. *Brignoni-Ponce*, 422 U.S. at 878; *Terry* v. *Ohio*, 392 U.S. at 22.

2. This case concerns the application of this balancing test to assess the reasonableness of the detention at the border of a suspected alimentary canal smuggler. A Customs officer can confirm or dispel a suspicion that a person is concealing drugs in his alimentary canal only by obtaining an X-ray of the suspect's abdomen or detaining the suspect in order to examine his bowel movements.[9]

slip op. 7 (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring)).

[9] The court below suggested that Customs officers could "let [suspected smugglers] into the country and try to follow [them]" (Pet. App. 6a). That approach would amount to an abrogation of the very purpose of Customs inspections—to *prevent* contraband from entering the United States. Moreover, such a course of action would be extremely impractical. Once the suspected smuggler is allowed to proceed on his or her own way, an investigation would ordinarily have to comply with the stricter standards applicable away from the border, thereby making detection more difficult (but cf. *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983)). In any event, an alimentary canal smuggler is likely to excrete the drug-filled containers in a hotel room or some other private place. Since government agents almost certainly would not be able to view this activity, they would not be able to gain additional information casting suspicion upon the smuggler. Thus, the smuggler probably would be able successfully to transfer the drugs (also out of public view) to his domestic confederates.

Permitting a suspected smuggler to return to his country of origin also is an unsatisfactory alternative because it would allow the suspect to escape apprehension and return to repeat

The courts of appeals have applied different rules in assessing the reasonableness under the Fourth Amendment of the use of these procedures. The Ninth Circuit has concluded that X-ray searches are the equivalent of searches of a suspect's body cavities and therefore can be conducted only if there is a "clear indication" that the suspect is an alimentary canal smuggler—the test it had previously established for border body cavity searches. See *United States* v. *Quintero-Castro*, 705 F.2d 1099 (9th Cir. 1983).[10] The practical impact of that decision on law enforcement efforts to detect and prevent the entry of contraband into the country was not great so long as the alternative of detention remained available where, as here, consent to an X-ray was not given. In the present case, however, the Ninth Circuit has held that the same standard governs the detention of suspected alimentary canal smugglers in order to examine their bowel movements. Pet. App. 6a.

The Fifth and Eleventh Circuits, by contrast, have held that an X-ray search is permissible if the Customs officer has a "reasonable suspicion" that the suspect is engaged in smuggling activity, a less stringent test than the Ninth Circuit rule. *United States* v.

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his smuggling efforts another day. In addition, this approach would remove a disincentive to smuggling activity by materially reducing the risk of apprehension and prosecution.

[10] See also *United States* v. *Castrillon*, 716 F.2d 1279, 1282 (9th Cir. 1983); *United States* v. *Mendez-Jimenez*, 709 F.2d 1300, 1302 (9th Cir. 1983); *United States* v. *Couch*, 688 F.2d 599, 604-605 (9th Cir. 1982); *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982); *United States* v. *Aman*, 624 F.2d 911, 912-913 (9th Cir. 1980). One Ninth Circuit panel has questioned the wisdom of this decision (*United States* v. *Shreve*, 697 F.2d 873 (1983)).

Vega-Barvo, 729 F.2d 1341, 1346-1350 (11th Cir. 1984), petition for cert. pending, No. 84-5553; *United States* v. *Mejia*, 720 F.2d 1378, 1381-1382 (5th Cir. 1983).[11] The Eleventh Circuit has applied the same standard to the detention of a suspect in order to examine his bowel movements. It held that when a Customs officer reasonably suspects that a person is a drug smuggler, "[t]he detention of [the suspect] at the border long enough to reveal by natural processes that which would be disclosed by a more expeditious x-ray search cannot be held to be an unreasonable seizure. Nor can the search of the results of that natural process be held to be an unreasonable search." *United States* v. *Mosquera-Ramirez*, 729 F.2d 1352, 1357 (11th Cir. 1984).[12] In our view, the Eleventh Circuit rule properly accommodates the interests of the government and the interests of travelers with respect to both X-ray searches and detentions of the type at issue in this case.[13]

a. As we have discussed (see pages 14-17, *supra*), the propriety under the Fourth Amendment of the

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[11] See also *United States* v. *Saldarriaga-Marin*, 734 F.2d 1425 (11th Cir. 1984); *United States* v. *Castaneda-Castaneda*, 729 F.2d 1360, 1363 (11th Cir. 1984), petition for cert. pending, No. 84-5556; *United States* v. *Padilla*, 729 F.2d 1367, 1368 (11th Cir. 1984).

[12] Accord, *United States* v. *De Montoya*, 729 F.2d 1369, 1371 (11th Cir. 1984); *United States* v. *Henao-Castano*, 729 F.2d 1364, 1366 (11th Cir. 1984), petition for cert. pending, No. 84-5554; *United States* v. *Solimini*, 560 F. Supp. 648, 653-654 (E.D.N.Y. 1983).

[13] We discuss the X-ray search issue in our brief in opposition in *Vega-Barvo* v. *United States*, petition for cert. pending, No. 84-5553, a copy of which has been provided to counsel for respondent.

detention of a person at the border is measured against a relaxed standard of reasonableness. This is a result not only of the government's compelling interest in regulating the entry of people and goods into the country, but also of travelers' reduced expectations of liberty in the border context. Since almost the beginning of the nation, statutes have authorized detentions at the border for the purpose of determining whether a person seeking to enter the country is carrying contraband. See, *e.g.*, Act of Mar. 9, 1815, ch. 94, § 2, 3 Stat. 232; see also page 15 note 7, *supra*. Persons seeking to enter the country are on notice that they may be detained at the border until it is established that they are entitled to enter. *United States* v. *Mosquera-Ramirez*, 729 F.2d at 1356; see *United States* v. *King*, 517 F.2d 350, 353 (5th Cir. 1975), cert. denied, 446 U.S. 966 (1980); Barnett, *A Report On Search And Seizure At The Border*, Am. Crim. L. Q., Aug. 1963, at 36, 39-41; cf. *United States* v. *Martinez-Fuerte*, 428 U.S. at 561.

To determine the reasonableness of a detention under the Fourth Amendment it is necessary to balance the justification for the detention against the extent to which the detention infringes upon the individual's expectation of liberty. As the Eleventh Circuit has observed in this context, "[c]onsideration of the reasonableness of the length of detention must focus on the purpose of detention in the first place." *United States* v. *Mosquera-Ramirez*, 729 F.2d at 1356; cf. *United States* v. *Place*, slip op. 10; *Michigan* v. *Summers*, 452 U.S. at 701-706; *Terry* v. *Ohio*, 392 U.S. at 19-20; 3 W. LaFave, *Search and Seizure* § 9.2, at 39-40 (1978).

Where the purpose of the detention is to conduct a border search that is reasonable under the Fourth

Amendment, it is reasonable for the government to detain the suspect for the time needed to conduct the search. *United States* v. *Mosquera-Ramirez*, 729 F.2d at 1356; *United States* v. *Des Jardins*, No. 82-1247 (9th Cir. Sept. 21, 1984), slip op. 4150 n.9; *United States* v. *Espericueta-Reyes*, 631 F.2d 616, 621-622 (9th Cir. 1980); cf. *United States* v. *Place*, slip op. 10; *Michigan* v. *Summers*, 452 U.S. at 701-706. The determination that a given quantum of suspicion permits the government to engage in a search would be meaningless if it did not carry with it the authority to detain the suspect in order to conduct the search.[14] This is especially true in the border setting because the purpose of the search is to *prevent* persons from entering the country with contraband. Moreover, in light of the reduced liberty expectations of persons seeking to cross the border, such a detention is much less intrusive than the detention of a person occurring inside the United States. The validity of the detention in this case therefore depends upon the reasonableness of the search contemplated by the Customs officers—the examination of respondent's bodily wastes.

b. The reasonableness of a search must be determined by balancing the government's interest in preventing the importation of contraband against the individual's expectations of "personal privacy and dignity" protected by the Fourth Amendment. *Schmerber* v. *California*, 384 U.S. 757, 767 (1966). See pages 13-17, *supra*. In assessing the reasonableness of border searches, the courts of appeals have created two general categories. A "routine" search of a traveler's

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[14] The government's diligence in conducting the search may be a factor in assessing the reasonableness of the search. Cf. *United States* v. *Place*, slip op. 13.

belongings and outer garments has been held to be proper on the basis of nothing more than a Customs officer's subjective view that such a search is appropriate.[15] More intrusive searches, such as a strip search in which the suspect is told to remove his clothes and is subjected to a visual inspection, or a search by medical personnel of a suspect's body cavities, have been upheld only when the officer's suspicion is reasonably based upon objective facts. Most of the courts of appeals require that the officer possess a "reasonable suspicion" that contraband will be discovered in order to conduct these more intrusive searches.[16] The Ninth Circuit, however, has further divided these more intrusive searches into two categories: "real suspicion" is needed to permit a strip search,[17] and a

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[15] *United States* v. *Vega-Barvo*, 729 F.2d at 1345; *United States* v. *Grotke*, 702 F.2d 49, 51 (2d Cir. 1983); *United States* v. *Sandler*, 644 F.2d 1163, 1167-1169 (5th Cir. 1981) (en banc); *United States* v. *Asbury*, 586 F.2d 973, 975 (2d Cir. 1978); *United States* v. *Palmer*, 575 F.2d 721, 723 (9th Cir.), cert. denied, 439 U.S. 875 (1978); *United States* v. *Himmelwright*, 551 F.2d 991, 993-994 (5th Cir.), cert. denied, 434 U.S. 902 (1977).

[16] *United States* v. *Vega-Barvo*, 729 F.2d at 1345; *United States* v. *Pino*, 729 F.2d 1357, 1359-1360 (11th Cir. 1984); *United States* v. *De Gutierrez*, 667 F.2d 16, 19 (5th Cir. 1982); *United States* v. *Asbury*, 586 F.2d at 976; *United States* v. *Wardlaw*, 576 F.2d 932, 934 (1st Cir. 1978).

[17] *United States* v. *Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970). The Ninth Circuit has defined "real suspicion" in this context as "subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law" (*ibid.*). This standard essentially is the equivalent of the reasonable suspicion test adopted by the other courts of appeals.

"clear indication" or "plain suggestion" that contraband is contained in the suspect's body is the prerequisite for a body cavity search.[18]

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[18] *Rivas* v. *United States*, 368 F.2d 703, 710-712 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967). The Ninth Circuit has explained that " '[c]lear indication' means more than real suspicion but less than probable cause." *United States* v. *Mendez-Jimenez*, 709 F.2d at 1302.

This "clear indication" language was taken from this Court's decision in *Schmerber* v. *California*, 384 U.S. 757 (1966). In *Schmerber*, the defendant was arrested for driving under the influence of intoxicating liquor. At the direction of a police officer, a physician withdrew a blood sample from the defendant's body. The defendant asserted that the extraction of blood constituted an unlawful search and seizure. This Court held that while there "plainly" was probable cause to arrest the defendant, the extraction of blood could not be upheld as a search incident to arrest (384 U.S. at 768-769). It stated (*id.* at 769-770):

> The interests in human dignity and privacy which the Fourth Amendment protects forbid * * * [intrusions beyond the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

The Court nevertheless upheld the blood test because the facts establishing probable cause to arrest "also suggested the required relevance and likely success" of the blood test (*id.* at 770).

Thus, *Schmerber* uses the "clear indication" standard to suggest that the kind of search there had to be supported by particularized probable cause, rather than to designate some intermediate level of suspicion between reasonable suspicion and probable cause as a standard for assessing certain searches. Whether or not it might be appropriate to adopt

We accept the appropriateness of applying the "reasonable suspicion" standard in measuring the permissibility of more intrusive border searches such as strip searches—at least as to citizens [19]—just as it has been applied by this Court in a variety of other contexts in which an objective showing short of probable cause is required to demonstrate the reasonableness of government action. *New Jersey* v. *T.L.O.*, slip op. 14-15; *Michigan* v. *Long*, *supra*; *Michigan* v. *Summers*, *supra*; *United States* v. *Brignoni-Ponce*, 422 U.S. at 881; *Terry* v. *Ohio*, 392 U.S. at 20-27. This standard presently is applied by most of the courts of appeals, and even the Ninth Circuit's "real suspicion" rule actually is equivalent to a "reasonable suspicion" test (see page 22 note 17, *supra*).

The search of a suspect's bodily wastes for the presence of balloons containing illegal narcotics involves an intrusion upon privacy interests no greater than that accompanying a strip search and therefore should be assessed under the reasonable suspicion standard. Assuming *arguendo* that some more stringent standard might apply to body cavity searches,[20]

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such an intermediate standard for some situations, *Schmerber* therefore provides no support for the rule adopted by the Ninth Circuit. See 3 W. LaFave, *Search and Seizure* § 10.5, at 286-287 (1978).

[19] Our principal argument does not distinguish between the detention at the border of returning citizens and aliens seeking to enter the United States. We argue below (see pages 34-37, *infra*) that the detention of an alien such as respondent is permissible even if the detention of a returning citizen in similar circumstances might be held to violate the Fourth Amendment.

[20] The reasonable suspicion standard, rather than the Ninth Circuit's "clear indication" test, also should apply to body cavity searches. This Court has not previously recognized an

we believe it is plain that the search of a suspect's bowel movements has none of the characteristics of a more intrusive body cavity search. The Ninth Circuit has differentiated between strip searches and body cavity searches by noting that body cavity searches result in an intrusion by the searcher into "the most intimate portions of [the suspect's] anatomy" and carry with them the possibility that the suspect will suffer pain or physical harm. *United States* v. *Cameron* 538 F.2d 254, 258 (9th Cir. 1976); see also *United States* v. *Holtz*, 479 F.2d 89, 92-94 (9th Cir. 1973); *Rivas* v. *United States*, 368 F.2d 703, 710 (9th Cir. 1966), cert. denied, 386 U.S. 945 (1967). The inspection of a suspect's body wastes does not involve an intrusion of this type, and does not threaten harm or pain to the suspect.

Although we strongly disagree with the Ninth Circuit's conclusion that an X-ray search is as intrusive

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intermediate level of suspicion between reasonable suspicion and probable cause, and the Ninth Circuit has been criticized for its approach. See *United States* v. *Afanador*, 567 F.2d 1325, 1328 (5th Cir. 1978); *United States* v. *Himmelwright*, 551 F.2d at 995. An intermediate standard is not needed in order to limit the use of body cavity searches to appropriate situations because the scope of a search necessarily is limited by the facts supporting the officer's suspicion. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. at 16-20. Thus, a reasonable suspicion justifying a body cavity search must be supported by facts "which would cause [the Customs] inspectors to reasonably believe that contraband * * * would be revealed in a [body cavity] search." *United States* v. *Pino*, 729 F.2d 1357, 1359 (11th Cir. 1984). Since this requirement is embodied in the reasonable suspicion standard, it results in a "flexible test which adjusts the strength of suspicion required for a particular search to the intrusiveness of that search." *United States* v. *Vega-Barvo*, 729 F.2d at 1344.

as a body cavity search,[21] even the reasons advanced in support of that determination are inapplicable here. The court rested its decision on its view that an X-ray search "goes beyond the passive inspection of body surfaces" and "is potentially harmful to the health of the suspect." *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982). In a search of a suspect's body wastes, there is no intrusion of any sort into the suspect's body and no even arguable threat to the suspect's health. Thus, the search contemplated in the present case is no more intrusive than a strip search and therefore should be upheld on the basis of "reasonable suspicion." [22]

c. Apart from the question of the validity of a search of bodily wastes in itself, the decision to undertake this type of search often involves a substantial period of detention, as it did here, because the search cannot take place until after the suspect has eliminated the wastes. As previously noted (pages 20-21, *supra*), it is ordinarily permissible to detain a person for the length of time reasonably necessary to per-

[21] See our brief in opposition in *Vega-Barvo* v. *United States*, *supra*.

[22] The search of a suspect's bowel movements certainly could result in no more indignity than a search involving the removal of an artificial limb, which has been viewed by the courts as the equivalent of a strip search because it lacks the intrusive characteristics of a body cavity search. *United States* v. *Sanders*, 663 F.2d 1, 3 (2d Cir. 1981); *United States* v. *Carter*, 563 F.2d 1360, 1361 (9th Cir. 1977). The *Sanders* court noted that although "the exposure of the stump to which the prosthetic device is attached, accompanied by a temporary lack of mobility, constitutes an embarrassment," the search is "no more intrusive than [a] strip search * * * and clearly less intrusive than a body-cavity search." 663 F.2d at 3 (footnote omitted).

form a lawful search, and, although the detention in cases like this may be lengthier than would be proper in most other contexts, that principle still applies here. In general, the intrusiveness of a border detention of this type is lessened by the substantially reduced liberty expectations of travelers at the border. At the same time, the government's interest is especially strong because of the purpose of the detention. A rule requiring the government to release into the United States persons who are reasonably suspected of smuggling narcotics would directly undermine the government's compelling interest in preventing the importation of contraband.

It is important in assessing the reasonableness of the detention to recognize that this is not a situation in which the length of detention is subject to the unconstrained discretion of the Customs officers. Cf. *Delaware* v. *Prouse*, 440 U.S. 648, 662-663 (1979). The suspect, not the government, controls the length of the detention. Here, respondent apparently engaged in "heroic efforts to resist the usual calls of nature" by refusing all food and water (Pet. App. 4a), in order to thwart a search of her bowel movements. The length of the detention cannot be grounds for transforming a reasonable search into an unreasonable search when the period of detention is extended as a result of the suspect's own efforts.[23] In addition, as the facts of this case demonstrate, a longer period of detention actually serves to reinforce the Customs officers' suspicion that the suspect is an alimentary canal smuggler. A suspect's attempts to impede the very function that, if he is not a smuggler,

[23] A somewhat similar question is before the Court in *United States* v. *Sharpe*, No. 83-529 (argued Nov. 27, 1984).

is the key to his release supplies clear evidence that he has something to hide (see Pet. App. 10a).

Finally, a suspect cannot complain of the intrusiveness of the detention if he selected detention over the alternative of an X-ray search. A reasonable suspicion of alimentary canal smuggling is sufficient to justify an X-ray search as well as detention. An X-ray search involves an invasion of privacy no greater than that attendant to a strip search: there is no physical contact between the searcher and the suspect and no physical intrusion into the suspect's body. X-ray examinations are now a common part of routine physical examinations and, if conducted in accordance with sound medical practice, are not viewed as a health hazard by either the public or the medical profession. See our brief in opposition in *Vega-Barvo* v. *United States*, *supra*, at 7-11.

Thus, when a Customs officer acquires a reasonable suspicion that a traveler is engaged in alimentary canal smuggling, the suspect generally will be faced with a choice between these two search procedures.[24] We have little doubt that most innocent travelers confronted with the choice would elect a prompt X-ray as the means of dispelling suspicion and gaining entry into the country. Be that as it may, the suspect's decision to choose one method over another indicates that, in his view, the method selected is the least objectionable. If the suspect chooses detention over a more expeditious X-ray search, he should not later be heard to complain about the length of the period of detention. For all of these reasons, the reasonable sus-

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[24] In some, relatively rare, situations an X-ray examination might not be appropriate for medical reasons, such as if the suspect were pregnant.

picion standard properly accommodates both the liberty interests and the privacy interests implicated by the detention of a suspected smuggler for the purpose of examining his body wastes.

d. The conclusion of the court below that the detention in this case should be measured against the more stringent "clear indication" standard governing body cavity searches did not rest upon an assessment of the intrusiveness of the detention.[25] The court apparently concluded that the Customs officers' decision to detain respondent was an attempt to circumvent its rule regarding the standard for X-ray searches. It held that because the Customs officers could not perform an X-ray search, they could not detain respondent in order to examine her bowel movements. Pet. App. 6a. Thus, the decision rested upon the Ninth Circuit's rule regarding the intrusiveness of an X-ray search.[26]

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[25] The court did characterize the detention as "long" (Pet. App. 6a) and noted that the detention "impacted both the comfort and the dignity of a human being" (Pet. App. 4a), but it did not relate these observations to its decision to apply the clear indication test in this case.

[26] The court below also noted several times that the Customs officers did not obtain a warrant authorizing either the detention or an X-ray search (see Pet. App. 4a, 5a, 6a, 7a). It stated that " 'the absence of a warrant is an important factor in assessing the reasonableness with which the authorities acted.' " Pet. App. 2a n.2, quoting *United States* v. *Cameron*, 538 F.2d 254, 259 (9th Cir. 1976). However, as the court below itself acknowledged (Pet. App. 2a n.2), warrants are not required for border searches. *United States* v. *Ramsey*, 431 U.S. at 619. The Fourth Amendment states that "no warrants shall issue, but upon probable cause * * *," and where, as here, a lesser standard applies, a warrant cannot be required. See *South Dakota* v. *Opperman*, 428 U.S. 364, 370

As we have just discussed, a suspect permitted to choose between two investigative methods may not be heard to complain that the method that he or she selected is more intrusive than the alternative. The Ninth Circuit's approach turns this principle on its head and enables a suspect to complain on the ground that the investigative method that was *not* selected—here, the X-ray search—would have been impermissible under the circumstances. Such a rule is plainly incorrect because a suspect's expectations of privacy cannot be infringed by a search that the government did not conduct; these expectations can be affected only by the search that actually is performed by the government.

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n.5 (1976); Fed. R. Crim. P. 41(c). A warrant requirement would be especially inappropriate in this context because the suspect would have to be detained while the officer obtained the warrant—in this case a process that, when it eventually occurred, appears to have taken about nine hours (see J.A. 40). The detention for this purpose could last as long as the detention necessary to effect the search. See, *e.g.*, *United States* v. *Couch*, 688 F.2d at 601-604; *United States* v. *Ek*, 676 F.2d at 382.

We note that the government can obtain a court order under the All Writs Act, 28 U.S.C. 1651, authorizing medical procedures such as X-ray and body cavity searches. The Customs Service informs us that the hospitals in which these procedures are performed sometimes request that the Service obtain such orders if the suspect refuses to sign a medical consent form. If a court order has been obtained from a neutral and detached magistrate, that fact may sustain the validity of the search (see *United States* v. *Ventresca*, 380 U.S. 102, 106 (1965)) or bar suppression of the evidence (see *United States* v. *Leon*, No. 82-1771 (July 5, 1984)). The Ninth Circuit's approach, by contrast, penalizes the government for failing to obtain a court order, even though a court order is not a prerequisite to a lawful search.

This Court recently applied this principle in addressing the status under the Fourth Amendment of a "canine sniff" of luggage. See *United States* v. *Place*, slip op. 10-11. A sniff test reveals whether a piece of luggage may contain narcotics—information that also could be obtained by an officer's search of the contents of the luggage—but the sniff test "is much less intrusive than a typical search" (*id.* at 10). The Court held that a canine sniff therefore does not constitute a "search" under the Fourth Amendment, despite the fact that the opening of the luggage by an officer obviously would constitute a search (*ibid.*). Similarly, in the present case, the propriety of the detention must be ascertained on the basis of the intrusiveness of that action, not the intrusiveness of a hypothetical X-ray search. As we have shown, the quantum of suspicion required to conduct a strip search is all that is required to permit a detention of the type at issue in this case.[27]

3. The appropriateness of the "reasonable suspicion" standard in this context also is supported by important practical considerations. Illegal drugs increasingly are being imported into the United States

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[27] The above discussion is premised on acceptance of the Ninth Circuit's hypotheses that an X-ray search is properly equated with a body cavity search and that both require more than reasonable suspicion. The burden of our argument is that those propositions, even if correct, do not control the question of the reasonableness of the detention here. We note, however, our disagreement with each of the hypotheses used by the Ninth Circuit to construct its logically fallacious ratio decedendi. For the reasons stated above (page 28, *supra*) and in our brief in opposition in *Vega-Barvo* v. *United States*, *supra*, an X-ray search conducted under proper medical supervision is justified when a Customs officer has a reasonable suspicion that the suspect is carrying contraband.

through the use of alimentary canal smugglers. See *e.g.*, *United States* v. *Mejia*, 720 F.2d at 1382 (importing of cocaine in this manner "is now common"); *United States* v. *Mendez-Jimenez*, 709 F.2d 1300, 1301 (9th Cir. 1983) (25 alimentary canal smugglers apprehended on a single flight from Colombia).[28] Drug importers have turned to alimentary smuggling because the technique is difficult to detect. Body cavity smuggling, which also has been used to import illegal narcotics into the United States, is characterized by certain external signs, such as an unnaturally stiff gait, restricted body movements, possession of lubricants, objects protruding from body cavities, and the presence of lubricants on undergarments or body orifices. See, *e.g.*, Pet. App. 10a. Alimentary canal smuggling, however, "does not leave the external signs that body cavity (*e.g.*, rectum or vagina) smuggling does." *United States* v. *Mendez-Jimenez*, 709 F.2d at 1303; see also Pet. App. 10a. Thus, it is especially true in this context that "the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement." *United States* v. *Mendenhall*, 446 U.S. at 562 (Powell, J., concurring).

[28] The large number of reported appellate decisions relating to this smuggling technique provides graphic evidence of its increasing use. See *United States* v. *Saldarriaga-Marin, supra; United States* v. *Vega-Barvo, supra; United States* v. *Mosquera-Ramirez, supra; United States* v. *Padilla, supra; United States* v. *Pino, supra; United States* v. *Henao-Castano, supra; United States* v. *Castaneda-Castaneda, supra; United States* v. *De Montoya, supra; United States* v. *Caicedo-Guarnizo*, 723 F.2d 1420 (9th Cir. 1984); *United States* v. *Mejia, supra; United States* v. *Castrillon, supra; United States* v. *Gomez-Diaz*, 712 F.2d 949 (5th Cir. 1983), cert. denied, No. 83-5763 (Jan. 9, 1984); *United States* v. *D'Allerman*, 712 F.2d 100 (5th Cir. 1983), cert. denied, No. 83-5359 (Oct. 11, 1983); *United States* v. *Mendez-Jimenez, supra, United States* v. *Quintero-Castro, supra; United States* v. *Couch, supra; United States* v. *Ek, supra.*

The standard adopted by the Ninth Circuit would significantly curtail the ability of Customs officers to apprehend alimentary canal smugglers because this type of smuggling generally is not accompanied by the kind of evidence that court believes is needed to supply a "clear indication" that the suspect is an alimentary canal smuggler. Customs officers generally must rely on "the travelers' inability to explain his or her trip" and other factors that might appear innocent when viewed individually, but which, when viewed in their entirety, reasonably would lead an experienced Customs inspector to suspect the traveler of carrying contraband. *United States* v. *Vega-Barvo*, 729 F.2d at 1351; see also pages 39-41, *infra*. This type of information apparently is insufficient to justify detention under the Ninth Circuit rule because it does not directly indicate the presence of drugs within the suspect's body in the way that lubricants signal the presence of body cavity smuggling. See Pet. App. 6a-7a; *United States* v. *Quintero-Castro*, 705 F.2d at 1100-1101. Thus, persons whom Customs officers reasonably suspect of carrying drugs, such as respondent, could not be subjected to further examination, and would be permitted to enter the United States.

The special problems of detecting this type of narcotics trafficking require a more flexible approach. See *United States* v. *Place*, slip op. 8 & n.5; *Florida* v. *Royer*, 460 U.S. 491, 519 (1983) (Blackmun, J., dissenting). In light of the absence of alternative methods for detecting alimentary canal smugglers

(see page 17 note 9, *supra*),[29] and the relatively minor intrusion associated with this investigative technique, this Court should uphold detentions for this purpose on the basis of reasonable suspicion. As the dissenting judge below warned, "[t]o deny the validity of reasonable detentions would reward the increasing ingenuity of narcotics smugglers and seriously hamstring the good faith efforts of customs officials to stem the flow of illegal narcotics across our borders." Pet. App. 12a.

4. Even if the Court does not agree with our contention that the reasonable suspicion standard should govern border detentions of the type at issue in this case, we submit that the government may detain at the border aliens seeking to enter the United States—as opposed to returning citizens—who are suspected of smuggling narcotics.

A person seeking to invoke the protection of the Fourth Amendment must show that "a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy [or liberty]' * * * has been invaded by government action." *Smith* v. *Maryland*, 442 U.S. at 740. The inquiry is whether the individual has a subjective expectation of privacy or liberty "that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U.S. at 361 (Harlan, J., concurring); see also *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 7; *Smith* v. *Maryland*, 442 U.S. at 740-741. The statutes governing the admission of aliens into this country strictly limit aliens' expectations of privacy and liberty prior to entry into the United States. Since the detention of an alien in order to determine

[29] This is especially true in the Ninth Circuit, where Customs officers also cannot utilize X-ray searches in the absence of a "clear indication" of alimentary canal smuggling.

whether he or she is carrying narcotics does not infringe upon the privacy or liberty that the alien legitimately could expect under these statutes, such a detention does not violate the Fourth Amendment.

An alien can be excluded from admission into the United States on a variety of grounds (see, *e.g.*, 8 U.S.C. 1182), and Congress has directed that "[e]very alien * * * who may not appear to the examining immigration officer * * * to be clearly and beyond a doubt entitled to [enter] shall be detained for further inquiry * * *" (8 U.S.C. 1225(b)).[30] In view of this broad detention requirement, and travelers' general awareness that delays may accompany efforts to enter a foreign country, an alien seeking admission into the United States has a drastically limited expectation of liberty. Moreover, since an alien must be excluded from this country if immigration officials "know or have reason to believe [that the alien] is * * * an illicit trafficker in [narcotics]" (8 U.S.C. 1182(a)(23)), aliens such as respondent are on notice that they will be refused entry unless it appears clearly and beyond a doubt that they are *not* carrying narcotics.

In addition, 8 U.S.C. 1222 provides:

> For the purpose of determining whether aliens * * * arriving at ports of the United States be-

[30] This Court's decisions make clear that the Legislative and Executive Branches have plenary authority over immigration matters and that the Constitution does not limit the authority to detain aliens at the border pursuant to these statutes. See, *e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). We discuss this issue in our brief in *Jean* v. *Nelson*, No. 84-5240, at 25-35. A copy of that brief is being furnished to counsel for respondent.

> long to any of the classes excluded by this chapter, by reason of being afflicted with any of the diseases or mental or physical defects or disabilities set forth in section 1182(a) of this title * * * such aliens shall be detained * * * for a sufficient time to enable the immigration officers and medical officers to subject such aliens to observation and an examination sufficient to determine whether or not they belong to the excluded classes.

While it is not clear whether this statute specifically contemplates detention and a medical examination for the purpose of determining whether the alien has ingested illicit drugs and is therefore excludable under Section 1182(a)(23), it is quite plain that being examined while undressed, being X-rayed, having urine or feces inspected, and having body cavities examined are all routine medical procedures to which aliens (but not citizens) may be subjected to determine their medical fitness to enter the country. See 8 C.F.R. 234.1; 42 C.F.R. 34.4.

These statutes make plain that society is not willing to accord aliens at the border the rights of privacy and liberty enjoyed by persons inside the United States. Aliens can reasonably have only a drastically limited expectation that they will be free from detention and from searches effected through medical procedures. When the government's compelling interest in preventing the importation of contraband is weighed against these limited expectations of privacy and liberty, it seems clear that even a quantum of suspicion less than reasonable suspicion should suffice to justify the detention and search of an alien at the border.

This result is especially appropriate here. Respondent could not have had any reasonable expectation of liberty because she was subject to detention under the immigration statutes. She plainly was not "clearly and beyond a doubt" entitled to enter the United States because the Customs officers had a substantial suspicion that she was carrying narcotics (see pages 41-42, *infra*), a circumstance that would render her excludable under Section 1182(a)(23). Since the detention of respondent was authorized under Section 1225(b), she could not reasonably expect that she would be free to enter the United States. Her detention therefore did not violate the Fourth Amendment.

B. The Detention Of Respondent Was Lawful Because The Customs Officers Reasonably Suspected That She Was Engaged In Alimentary Canal Smuggling

The "reasonable suspicion" test is satisfied if Customs officers "are aware of specific articulable facts [that], together with rational inferences from those facts," reasonably warrant a suspicion that a person seeking to enter the country is carrying contraband. *United States* v. *Brignoni-Ponce*, 422 U.S. at 884; see also *United States* v. *Cortez*, 449 U.S. 411, 416 (1981). The district court held in the present case that the officers "were justified in having a very substantial suspicion that [respondent] may very well [have been] bringing in cocaine" (Pet. App. 14a). The court of appeals similarly concluded that "the officers had a strong suspicion that [respondent] was carrying drugs in her body" (*id.* at 4a; see also *id.* at 5a). In light of these concurrent findings of fact, this Court need not address this factual issue. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *Rogers* v. *Lodge*, 458 U.S. 613, 623

(1982) (collecting cases).[31] In any event, it is clear that the facts known to the Customs officers in the present case were more than sufficient to warrant the suspicion that respondent was attempting to smuggle narcotics into the United States.

The existence of reasonable suspicion must be determined on the basis of "an assessment of the whole picture" as viewed by "those versed in the field of law enforcement." *United States* v. *Cortez*, 449 U.S. at 418. This Court has emphasized that "objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion." *Id.* at 419; see also *United States* v. *Brignoni-Ponce*, 422 U.S. at 885. It is clear that "[a]mong the circumstances that can give rise to reasonable suspicion are the agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices." *United States* v. *Mendenhall*, 446 U.S. at 563-564 (Powell, J., concurring); see also *Florida* v. *Royer*, 460 U.S. at 524-526 nn. 5 & 6 (Rehnquist, J., dissenting).

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[31] In neither court below did respondent dispute that the facts known to the Customs officers satisfied the reasonable suspicion standard. She maintained only that they did not meet the clear indication standard necessary to permit an X-ray search and did not constitute probable cause, which she contended was necessary to authorize her detention. See E.R. 20-24; J.A. 11, 30-32; C.A. Br. 15, 18, 20. It was not until respondent filed her opposition to the petition for a writ of certiorari that she asserted that the facts known to the Customs officers at the inception of the detention failed to satisfy the reasonable suspicion standard. In our view, however, the information should have been held to satisfy even the clear indication standard, if not to amount to probable cause (see page 42, *infra*).

The Customs Service has learned through the experience of officers in the field that several facts reliably indicate that a suspect may be engaged in alimentary canal smuggling. These smugglers tend to be travelers from narcotics source countries who may previously have made a number of short trips to the United States. In addition, they generally have no hotel reservations and know no one in the United States. They may carry large amounts of American currency but do not have the amount of luggage and clothing that, in Customs officers' experience, is characteristic of a typical legitimate traveler. Finally, the suspects usually are not aware of the manner in which their airline tickets were purchased. See *United States* v. *Vega-Barvo*, 729 F.2d at 1350 (noting that the defendant was a South American traveling alone, had arrived from a drug source country, and was carrying a single piece of luggage); *United States* v. *Pino*, 729 F.2d 1357, 1358 (11th Cir. 1984) (the defendant, a Colombian, had only enough luggage for a short stay, and explained that his ticket had been purchased for him by another person); *United States* v. *Henao-Castano*, 729 F.2d 1364, 1365 (11th Cir. 1984), petition for cert. pending, No. 84-5554 (the defendant was a Colombian, could not explain the circumstances of the purchase of his ticket, planned to stay in a hotel but had made no reservations, and carried only one suitcase containing a small amount of clothing); *United States* v. *Padilla*, 729 F.2d 1367, 1368 (11th Cir. 1984) (the defendant was a Colombian, carried little luggage or clothing, and could not say how much his ticket cost); *United States* v. *Mejia*, 720 F.2d at 1380 (defendant carried $2,000 in cash, had traveled to the United

States twice in the last 14 months, and had no hotel reservations).[32]

Another important factor indicating that smuggling is afoot is "the traveler's inability to explain his or her trip" or the recital of an implausible story concerning the purpose of the journey. *United States* v. *Vega-Barvo*, 729 F.2d at 1350 (defendant's story that she was a travel agent not credible in light of indications that she lacked an education and had made no concrete business arrangements). See also *United States* v. *Mosquera-Ramirez*, 729 F.2d at 1354-1355 (defendant's claim that he had come to this country to purchase Betamax machines substantially weakened by lack of an explanation of how he intended to buy the merchandise with the funds at his disposal); *United States* v. *Pino*, 729 F.2d at 1359 (reasonable suspicion established by fact that, although defendant claimed to be in the television repair business, he knew nothing about television parts); *United States* v. *Castaneda-Castaneda*, 729 F.2d 1360, 1364 (11th Cir. 1984), petition for cert. pending, No. 84-5556 (defendant's claim that he was in the ceramics business impeached by the fact that he had only a superficial knowledge of basic business matters); *United States* v. *Henao-Castano*, 729 F.2d at 1365-1366 (defendant's statement that he was in the country to purchase electronic devices for his store undercut by his lack of a planned itinerary or knowledge concerning the business); *United States* v. *Padilla*, 729 F.2d at 1368 (reasonable suspicion established, inter alia, because defendant, who claimed

[32] Special Agent Windes explained in his affidavit in support of the application for the court order that a lack of luggage and other personal belongings "indicat[es] a 'stripped down' or 'clean' approach typical of professional couriers" (J.A. 42).

to be visiting country to purchase business machines, told an implausible story about the items he hoped to purchase and lacked a realistic plan as to how to transport these items); *United States* v. *Mejia*, 720 F.2d at 1380 (defendant claimed to be on a buying trip but did not have appropriate business dress).

As the court of appeals acknowledged, respondent "possessed almost all of the indicators" used to identify drug couriers (Pet. App. 3a n.3). She was traveling from Colombia, a source country for narcotics, on a trip of short duration, and previously had made numerous short trips to Miami and Los Angeles. Respondent had no family or friends in the United States and no confirmed hotel reservation, carried $5,000 in cash, and could not recall where she had purchased her airline ticket. Pet. App. 2a n.3; J.A. 41-42, 46, 62; E.R. 40.

Respondent explained that the purpose of her trip was to purchase clothing and electrical appliances for her husband's retail business in Colombia, and to support that claim she exhibited business cards and a book of invoices (J.A. 14-15). Although this story initially may have had a patina of credibility, its plausibility was seriously eroded upon further questioning by the Customs officers. Thus, although respondent supposedly had traveled several thousand miles at substantial cost for this purpose, she admitted that she had no concrete plan for purchasing these items other than visiting various retail merchants by taxicab (J.A. 62; E.R. 40). Indeed, respondent's statements closely paralleled the claims of other alimentary canal smugglers who have posed as buyers for retail stores. See pages 40-41, *supra*.

The unusual arrangement of undergarments worn by respondent—two pairs of elastic underpants together with a paper towel in her crotch (J.A. 57, 62-63)—provided further support for the officers' sus-

picion that respondent was engaged in smuggling. This multi-layered barrier is indicative of an effort to prevent discovery of any premature release of the items concealed in respondent's digestive tract.

These facts far surpass the minimum showing required to establish a reasonable suspicion that respondent was engaged in smuggling. Even if some intermediate level of suspicion greater than reasonable suspicion were necessary to uphold the detention, the evidence of the undergarments combined with the key characteristics of alimentary canal smuggling exhibited by respondent in fact provided a "clear indication" that contraband would be discovered in respondent's bowel movements. Indeed, we think these facts supply the showing of a "probability or substantial chance of criminal activity" required to meet the standard of probable cause. *Illinois* v. *Gates*, 462 U.S. 213, 244 n.13 (1983); see also *id.* at 235; Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois *v.* Gates, 17 U. Mich. J.L. Ref. 465, 476-478, 495-501 (1984). The Customs officers therefore were justified in detaining respondent in order to determine whether she was engaged in smuggling.[33]

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[33] The court of appeals did not question that respondent's behavior while she was detained—her failure to eat, drink, or use the bathroom and symptoms of discomfort indicating "heroic efforts to resist the usual calls of nature" (Pet. App. 4a)—in combination with the evidence discussed above, supplied the "clear indication" of alimentary canal smuggling required for a body cavity search in the Ninth Circuit. Therefore, the rectal search that revealed the balloon filled with cocaine was proper under the Fourth Amendment, and the evidence is subject to suppression only if it can properly be held a fruit of an illegal detention.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 84-755

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Petitioner,

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Whether respondent, who was suspected of attempting to smuggle contraband drugs carried within her body and who refused to submit to an x-ray, could lawfully be detained at the border by customs officers for the period of time necessary to examine her bodily wastes.

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STATEMENT OF THE CASE

Shortly after midnight on March 5, 1983, Rosa Elvira Montoya de Hernandez arrived at the Los Angeles International Airport on a flight from Bogota, Colombia. After deplaning, Ms. de Hernandez proceeded to an immigration checkpoint where her travel documents were inspected. J.A. 7-8. Her passport and visa were found to be in order, and both Ms. de Hernandez' passport and the Immigration I-94 Form were stamped "admitted." J.A. 8. Having been cleared through immigration, Ms. de Hernandez then proceeded to the customs area. J.A. 7.

Customs officials reviewed her travel documents and directed Ms. de Hernandez to a secondary inspection area for a more thorough examination. There, United States Customs Inspector Jose Serrato inspected Ms. de Hernandez' passport, visa and airline tickets, and questioned her about her trip to the United States. J.A. 46. Her travel documents were found to be in order. She was traveling on a valid Colombian passport. J.A. 8. Inspector Serrato noticed that Ms. de Hernandez' passport reflected at least eight previous trips to the United States. J.A. 46. Inspector Serrato asked Ms. de Hernandez about the following topics:

1. The purpose of her trip.
2. How long will she stay.
3. Did she have any agricultural products.
4. Did she have $5000 in any currency. J.A. 46.

Ms. de Hernandez, who spoke no English, told Inspector Serrato that she was coming to the United States on a short business trip to buy merchandise, including clothing and small appliances, for her husband's store in Colombia, J.A. 14, and that she had approximately $5000 in cash with which to make her purchases. J.A. 57; E.R. 40. Ms. de Hernandez also showed Inspector Serrato a book of invoices[1] containing re-

[1] Exhibit 102, introduced into evidence at the suppression hearing in the district court, is a part of the trial record to which respondent wishes to

ceipts with her name on them, showing past buying trips at retail outlets on previous occasions when she was in this country. J.A. 15. Inspector Serrato examined the portfolio of invoices and receipts. J.A. 15; E.R. 40. Ms. de Hernandez then showed Inspector Serrato a business card from her husband's business in Colombia. J.A. 15-16.

In response to Inspector Serrato's further questions, Ms. de Hernandez told him that she would visit the stores in which she wished to make purchases by taxi, that she had no family or friends in the United States, and that although she had no confirmed reservations, her intention was to stay at the Holiday Inn. J.A. 41, 62; E.R. 40.

Inspector Serrato next examined Ms. de Hernandez' luggage and purse and noted the following:

> Ms. de Hernandez' purse, at the time that she came into Customs, contained the following: a make-up bag containing lipstick, mascara, rouge, mirror, eye liner, eye shadow; a purse containing perfume, hand cream, toothbrush, toothpaste, hairbrush, handkerchief, pictures of two children, a pen, and some U.S. currency;
>
> A suitcase containing nightgown, a 500-peso note, a pair of jeans, three blouses, three pairs of slacks, one green two-piece suit, assorted bras, panties and socks, two sweaters, and a brown skirt. J.A. 9.[2]

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direct the Court's particular attention. Because Exhibit 102 was not deemed suitable for photocopying, it was not made part of the Joint Appendix. Instead, the Clerk of this Court has obtained Exhibit 102 from the exhibits clerk in the district court, and it is available in the Clerk's Office.

[2] Inspector Serrato's sworn declaration, deemed his testimony on direct at the suppression hearing (J.A. 5-6), contained the statement that, when he examined Ms. de Hernandez' luggage, he noticed "no toiletries." J.A. 46. At the suppression hearing in the district court, this was shown to be false. J.A. 9, 31.

With respect to Serrato's conclusion that Ms. de Hernandez had "little clothing," J.A. 46, *compare*, *United States* v. *Padilla*, 729 F.2d 1367 (11th Cir. 1984) ("a few pairs of dungarees, a couple of t-shirts, and very little [sic] toiletries," which was "considered unusual for a visit of ten days.") 729 F.2d at 1368.

Inspector Serrato noticed that Ms. de Hernandez had with her only one pair of shoes, which she wore, and that she had no billfold. J.A. 46, 62.

After summoning another customs inspector to seek his advice, Inspector Serrato formed the opinion, based upon Ms. de Hernandez' responses and general demeanor, that she fit the profile of persons suspected of carrying drugs concealed in their bodies. J.A. 62.

Inspector Serrato thereupon directed that Ms. de Hernandez be taken to a search area for a pat-down search by a female customs inspector. J.A. 46, 57. This "pat-down" became a strip search. J.A. 57. The strip search failed to produce any evidence to support Inspector Serrato's suspicions. J.A. 16-17, 27. During the course of the strip search, the female customs inspector observed that Ms. de Hernandez was wearing two pairs of elastic type panties. When Ms. de Hernandez pulled these down she exposed "a paper towel placed in the crotch area to absorb what seemed to be a vaginal discharge." J.A. 57.

After the strip search, Serrato brought all the information he had at that time to the attention of his supervisors and asked them for permission to ask Ms. de Hernandez to consent to an x-ray search. J.A. 46. Serrato received the approval of his supervisors and "I asked passenger de Hernandez if she would consent to an x-ray of her abdomen area, and she stated 'yes.' " J.A. 47. Serrato next asked her if she was pregnant. Ms. de Hernandez responded that she believed she was. J.A. 47. "I asked her how long and if she was sure, and she stated 'about one month. I just saw the doctor before my trip here.' " J.A. 47.

Serrato advised his supervisors of this information and it was determined that possibly the doctors at the hospital could assist in determining if indeed she was pregnant. E.R. 40. Inspector Serrato then returned to Ms. de Hernandez and asked her if she would consent to a doctor's examination to verify her pregnancy. Ms. de Hernandez agreed to do so. J.A. 47.

As they prepared to depart for the hospital, Inspector Serrato informed Ms. de Hernandez that regulations required that she be placed in handcuffs and that her pant legs be taped closed in order to be transported to the hospital. At this point, Ms. de Hernandez became agitated and upset and withdrew her consent for an x-ray examination. J.A. 47, 63; E.R. 40.

After Ms. de Hernandez withdrew her consent for an x-ray examination, she requested permission to place a telephone call to her husband. This request was refused. J.A. 47.

Inspector Serrato then informed his supervisors that "she had refused consent because we had to handcuff her." J.A. 47. The supervisors called the customs duty agent (Agent Windes) "so we could obtain a court order." J.A. 47; E.R. 40.

At about 1:30 a.m. on March 5, 1983, Agent Windes, the duty agent, received a telephone call from a customs supervisor, who requested that he (Windes) obtain a court order for an x-ray search of Ms. de Hernandez. J.A. 39. During this conversation, the customs supervisor related to Agent Windes that Ms. de Hernandez met the profile developed for "balloon swallowers" and was believed to be a narcotics courier. J.A. 39. Windes decided that the facts then known probably would not support a court-ordered x-ray examination. Pet. App. 3a.[3]

While the customs supervisors were requesting that Agent Windes seek to obtain a court order, Ms. de Hernandez again asked to be allowed to call her husband. Inspector Serrato again denied her request. Ms. de Hernandez then asked if Inspector Serrato would call her husband in order to verify the information she had provided. She offered to give the inspector

[3] This conclusion by the Ninth Circuit Court of Appeals is supported by logic and common sense based upon what later transpired. Fifteen and one-half hours later, after important incriminating evidence had been developed over the course of a lengthy involuntary confinement, the same Agent Windes, using incriminating information gathered during the period of detention, did begin making efforts to apply for a court-ordered x-ray examination, notwithstanding the fact that Ms. de Hernandez still refused to consent to such an examination. J.A. 41-42.

the telephone number to do so. Inspector Serrato did not call her husband. J.A. 18, 47.

After Agent Windes declined to seek a court order, he instructed the customs supervisors that if Ms. de Hernandez would not cooperate, to "deport" her. J.A. 28, 58. The customs supervisors returned from their conversation with Agent Windes to advise Agent Serrato that Windes had declined to seek a court order. Agent Serrato was instructed to detain Ms. de Hernandez in customs' custody and to deport her on the next available flight back to Colombia, which was two days away.[4] J.A. 19, 48; E.R. 40.

Agent Serrato then returned to Ms. de Hernandez and informed her that the customs agents were "unable to obtain a court order from the Magistrate" and that they had been "instructed by Agent Windes to hold her until Monday and deport her on the next Avianca flight." J.A. 18, 48.

Inspector Serrato then informed Ms. de Hernandez that the customs agents would remain with her "until Monday until we deport her." He also told her that "if while she is in our custody, if she discharges anything illegal internally, she will be placed

[4] Petitioner states that Ms. de Hernandez was "afforded the option[ ]" of "returning to Colombia on the next available flight . . ." and that "[g]iven these choices, respondent opted to return to Colombia." Br. for Pet. 5. Petitioner's recitation is supported to some extent by the opinion of the court of appeals below. Pet. App. 3a. The contention that Ms. de Hernandez was given a choice of returning to Colombia on the next available flight, and that she voluntarily opted for that choice, is unsupported by the record below. If this were true, Ms. de Hernandez could be said to have consented to any period of detention reasonably incident to attempts to repatriate her, and by implication to the lesser period of detention involved here. Although petitioner does not argue in his brief that Ms. de Hernandez consented to be detained pending the next available flight back to Colombia, respondent believes that the facts in the record pertaining to this particular issue should be clarified so that unnecessary time is not wasted on this point at oral argument. The trial judge addressed this issue at the conclusion of the testimony at the suppression hearing. J.A. 37.

under arrest and transported to a jail ward and be unable to leave the United States." J.A. 48.

At about 1:30 a.m. (while the supervisors were speaking with Windes), Inspector Serrato and a female customs inspector took Ms. de Hernandez to a manifest room. Ms. de Hernandez was held in custody in the manifest room until 8:30 a.m., March 5, 1983, a period of seven hours. J.A. 20. The manifest room had a hard, uncarpeted floor, and did not have a bed or a couch, but only typical office chairs with slightly curved backs. J.A. 20, 25.

Present in the manifest room with Ms. de Hernandez were Agent Serrato and two female customs inspectors. J.A. 48, 64. The three custom inspectors sat observing Ms. de Hernandez until 8:30 the next morning. At no time did they sleep or lose sight of Ms. de Hernandez. J.A. 48. Ms. de Hernandez "sat in her chair clutching her purse" for the entire time. J.A. 20, 48; E.R. 40. She was not free to leave. J.A. 19. Ms. de Hernandez was informed by Agent Serrato that should she desire to use the restroom during the course of her detention, she would be accompanied to the restroom by two female customs inspectors and would be required to excrete into a waste basket under their observation. J.A. 28-29, 58.

Surveillance of Ms. de Hernandez continued throughout the next day. J.A. 64. At about 3:00 p.m., Ms. de Hernandez was strip searched a second time. ("This was to insure the safety of the surveilling officers.") J.A. 64. Again, no contraband or evidence of wrongdoing was found. J.A. 26, 50.

At approximately 4:00 p.m., March 5, 1983, Agent Windes arrived at the area where Ms. de Hernandez was being involuntarily confined. After being briefed, Agent Windes decided to begin efforts to seek a court order for an x-ray examination. J.A. 64. In preparing the affidavit in support of a request for a court order, Agent Windes relied on facts elicited during the previous sixteen hours of involuntary confinement, namely, that Ms. de Hernandez had refused food and drink over a sixteen hour period, that she had been sitting curled up

in a chair, leaning to one side, and that she refused to use the restroom over that period of time. J.A. 41-43, 64.

Until approximately 4:00 p.m. on March 5, 1983, Agent Windes took no affirmative steps to obtain a court order for an x-ray examination of Ms. de Hernandez. J.A. 23, 40, 64.

The preparation of Windes' affidavit and application for a court order took from approximately 4:00 p.m. until 12:00 midnight. At midnight a magistrate was contacted and a court order for an x-ray and body cavity search issued. J.A. 40, 44-45.

Ms. de Hernandez was then transported, in custody, to the Los Angeles Medical Center for a body cavity and x-ray search. J.A. 64. At the hospital, after a urinalysis was taken for purposes of a pregnancy test, but before its results were known, a vaginal and rectal body cavity search was performed by the doctor. At 3:00 a.m., during the course of the rectal search, the doctor located a balloon-shaped object in Ms. de Hernandez' rectum. J.A. 51.

At approximately 3:15 a.m., March 6, 1983, almost 27 hours after her initial detention, Ms. de Hernandez was formally placed under arrest and advised of her *Miranda* rights. J.A. 51. During the next hour Ms. de Hernandez expelled six more balloons from her rectum, all of which were determined to contain cocaine. J.A. 51. Over the next four days, Ms. de Hernandez excreted a total of 88 balloons containing cocaine. J.A. 65.

Ms. de Hernandez was detained in custody at the medical center until March 10, 1983 when she was transported to Sybil Brand Institute for Women. Ms. de Hernandez did not make her initial appearance before a United States Magistrate until March 11, 1983, one week after her initial detention had begun. J.A. 65.

SUMMARY OF ARGUMENT

Routine searches by customs officers at the border are justified as an act of national sovereignty and may be conducted with or without cause. As an investigation focuses on one particular traveler who is singled out for a more intrusive search, however, Fourth Amendment concerns are implicated, and the government has the burden of showing that the more intrusive search or seizure was reasonable under the circumstances. *Florida* v. *Royer*, 460 U.S. 491, 500 (1983)

The circuit courts of appeal have developed a consistent body of law applying the "reasonableness" requirement of the Fourth Amendment to the more intrusive border searches. The approach taken by the circuit courts of appeal weighs the special needs of law enforcement officers at the border against the Fourth Amendment rights of the individual.

The circuits have established a "hierarchy of intrusiveness" for these searches, and a "flexible test" which adjusts the strength of suspicion necessary for a particular search to the intrusiveness of the invasion of an individual's privacy and dignity in that particular case. *United States* v. *Sandler*, (5th Cir.), *infra* at 1166; *United States* v. *Vega-Barvo*, (11th Cir.), *infra* at 1344. Thus, the amount of articulable suspicion sufficient to justify a particular search may not suffice to justify a more intrusive or demeaning search. *United States* v. *Afanador*, (5th Cir.), *infra* at 1328.

The lengthy detention in this case exceeded the intrusiveness of a full-scale custodial arrest. As a result, Ms. de Hernandez suffered an invasion of Constitutionally protected privacy and dignity of major proportion. The amount of suspicion possessed by the customs officers, on the other hand, was insufficient to justify the treatment Ms. de Hernandez received under any standard of reasonableness.

Petitioner contends that once the customs agents developed a suspicion that Ms. de Hernandez was internally smuggling narcotics, they were entitled to detain her as long as was necessary to confirm or dispel their suspicions. Br. for Pet. 20-21. Petitioner's argument fails to consider that seizures of persons valid at their inception may become unreasonable because of the length or circumstances of the subsequent detention. *United States* v. *Place*, *infra*. Moreover, lengthy police detentions "for purposes of investigation" are the hallmark of a police state, not a free society, and have been repeatedly condemned by this Court. *Dunaway* v. *New York*, *infra*; *Davis* v. *Mississippi*, *infra*; *Hayes* v. *Florida*, *infra*.

ARGUMENT

I. HISTORICAL AND LEGAL BACKGROUND

This case presents for resolution the following question:

What balance is to be struck when the sovereign's interest in preventing the introduction of contraband at its border collides with the individual's right to be free of unreasonable searches and seizures?

Although this Court has never ruled on whether the Fourth Amendment[5] to the United States Constitution applies to border searches, it has on two occasions assumed that the "reasonableness" guarantee of the Fourth Amendment is applicable to searches and seizures at the border.[6]

In *United States* v. *Ramsey*, 431 U.S. 606 (1977), this Court, in *dicta*, interpreted the "border search exception" to mean that border searches are "excepted" only from the warrant and probable cause requirements of the Fourth Amendment, but not from the Fourth Amendment's more general proscription of unreasonable searches and seizures.[7] Although 19 U.S.C. Sections 482 and 1582[8] appear to statutorily authorize a plena-

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[5] App. 1a, *infra*.

[6] *United States* v. *Ramsey*, 431 U.S. 606, 622 (1977); *United States* v. *Villamonte-Marquez*, ___ U.S. ___ (1983), 33 Crim.L.Rep. (BNA) 3173, 3177.

[7] *Ramsey*, 431 U.S. at 615-619, 621-622.

[8] App. 1a-2a, *infra*.

ry customs power to seize and search individuals entering the country without respect to the reasonableness of the search, no Act of Congress can authorize a violation of the Constitution.[9]

Under what circumstances a border search would be deemed "unreasonable" has never been addressed by this Court.[10] The circuit courts of appeal have addressed that very issue, however, and over the last 28 years[11] have developed an extensive and essentially consistent body of law which applies the Fourth Amendment's "reasonableness" standard to border searches.

The legal principles which have evolved are as follows: routine border searches are *per se* reasonable even when based upon "mere suspicion," "unsupported suspicion," or a subjective hunch.[12] An individual's decision to cross our national border is justification enough for the search. Such searches are deemed reasonable simply by virtue of the fact that they occur at the border.[13] No articulable suspicion is required to justify such a search.[14]

The circuit courts of appeal have concluded that a "routine" border search includes the following matter-of-course incursions on an individual's liberty and privacy: the traveler may be stopped and asked to identify himself. His passport,

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[9] *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 877 (1975); *Ramsey*, 431 U.S. at 615.

[10] *See, e.g., Ramsey* at 618 n.13.

[11] *Blackford* v. *United States*, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958); *United States* v. *Willis*, 85 F. Supp. 745 (S.D. Cal. 1949). During this period of time, the Court denied certiorari in every case in which a petition was filed.

[12] *United States* v. *Sandler*, 644 F.2d 1163, 1166 (5th Cir. 1981) *(en banc)*; *Cervantes* v. *United States*, 263 F.2d 800, 803, n.5 (9th Cir. 1959).

[13] *United States* v. *Carter*, 592 F.2d 402, 404 (7th Cir.), *cert. denied*, 441 U.S. 908 (1979).

[14] *United States* v. *Himmelwright*, 551 F.2d 991, 993-94 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977); *Carroll* v. *United States*, 267 U.S. 132, 153-154 (1925); *See also Almeida-Sanchez*, 413 U.S. at 272.

visa and entry documents may be examined. He may be questioned briefly concerning the purpose of his trip and his estimated length of stay. His luggage may be searched. He may be asked to empty his pockets, to remove outer garments such as a hat, a coat or shoes, and he may be patted down or frisked. An individual may also be required to produce for inspection such personal effects as the contents of his or her pockets, a purse or a wallet.[15]

Such a detention and search is "routine" because its intrusiveness on the personal privacy and dignity of the individual is minimal. Although routine customs inspections can be irksome to the impatient traveler, they do not subject the individual to embarrassment, indignity, humiliation or fright. All travelers are subject to the same inconvenience and may be said to suffer in common.[16] To some extent all travelers may be said to be "on notice" of such routine procedures and may be said to have given implied consent to some inconvenience as a condition of international travel. As a result, international travelers may have a reduced expectation of privacy because of the notoriety of routine customs procedures.[17]

Prolonged detentions, strip searches and body cavity searches are not routine, and involve a greater invasion of an individual's personal privacy. "As [the] intrusiveness [of the search] increases, the amount of suspicion necessary to justify the search correspondingly increases." *United States* v. *Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir.), *cert. denied*, ____ U.S. ____ (1984), 36 Crim.L.Rep. (BNA) 4133; *United States* v. *Mejia*, 720 F.2d 1378, 1382 (5th Cir. 1983); *United States* v. *Quintero-Castro*, 705 F.2d 1099, 1100 (9th Cir. 1983).

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[15] *See Sandler*, 644 F.2d 1163, and the cases from other circuits collected therein.

[16] *See United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558-559 (1976).

[17] *United States* v. *King*, 517 F.2d 350, 353 (5th Cir. 1975).

Strip searches, where the traveler is asked to remove undergarments and perhaps disrobe altogether, have generally been held to be justified only by "reasonable suspicion" that the traveler is engaged in wrongdoing. Although a lesser standard than probable cause,[18] reasonable suspicion requires that the customs agent have a particularized, articulable suspicion that the traveler is engaged in illegal activity. More than a generalized subjective suspicion or "hunch" is necessary. The officer must be able to point to objective facts indicating criminal behavior.[19]

Body cavity searches, which involve a probing beyond the surface and into body orifices, typically the rectum or the vagina, are without exception considered to be more intrusive than strip searches, and correspondingly require a higher level of suspicion to justify their initiation.[20] Body cavity searches would also include searches of the contents of the stomach where an individual is forced to drink an emetic which produces immediate vomiting.[21]

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[18] Probable cause exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949).

[19] *United States* v. *Stornini*, 443 F.2d 833, 834 (1st Cir.), *cert. denied*, 404 U.S. 861 (1971); *United States* v. *Asbury*, 586 F.2d 973, 975-76 (2nd Cir. 1978); *United States* v. *Diaz*, 503 F.2d 1025, 1026-27 (3rd Cir. 1974); *United States* v. *Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970).

[20] *Vega-Barvo*, 729 F.2d at 1344-45; *United States* v. *Pino*, 729 F.2d 1357, 1359 (11th Cir. 1984); *United States* v. *Aman*, 624 F.2d 911, 912-13 (9th Cir. 1980).

[21] This is commonly referred to as "stomach pumping." *See Blefare* v. *United States*, 362 F.2d 870, 872, 881 n. 2 (9th Cir. 1966); *United States* v. *Cameron*, 538 F.2d 254 (9th Cir. 1976); *King* v. *United States*, 258 F.2d 754 (5th Cir. 1958), *cert. denied*, 359 U.S. 939 (1959); *United States* v. *Briones*, 423 F.2d 742 (5th Cir. 1970), *cert. denied*, 399 U.S. 933 (1970); *Barrera* v. *United States*, 276 F.2d 654 (5th Cir. 1960); *Lane* v. *United States*, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964); *See also Rochin* v. *California*, 342 U.S. 165 (1952).

The Ninth Circuit Court of Appeals requires a "clear indication" or "plain suggestion" to justify a search of an individual's body cavities at the border.[22] The Ninth Circuit's test is taken from this Court's opinion in *Schmerber* v. *California*, 384 U.S. 757 (1966), where the Court stated, in deciding that a sample of blood could be taken from a non-consenting individual who had been arrested for drunk driving:

> Whatever the validity of [routine searches incident to a valid arrest] they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Id. at 769.

As the Ninth Circuit has defined "clear indication," it is a level of suspicion higher than the "reasonable suspicion" necessary to justify a strip search, but something less than probable cause justifying an arrest.[23]

Although "clear indication" has not been employed as a form of words outside the Ninth Circuit, other circuits, including the Fifth and Eleventh Circuits, agree that body cavity searches are more intrusive than strip searches and that a higher level of suspicion is required to justify a body cavity search than would be required for a strip search.[24] The Fifth and Eleventh Cir-

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[22] *Rivas* v. *United States*, 368 F.2d 703, 710 (9th Cir. 1966).

[23] *United States* v. *Mendez-Jimenez*, 709 F.2d 1300, 1302 (9th Cir. 1983).

[24] *Sandler*, 644 F.2d at 1167-68; *Vega-Barvo*, 729 F.2d at 1344 ("Fifth Circuit cases prior to Oct. 1, 1981 . . . together with Eleventh Circuit cases, establish a hierarchy of intrusiveness of [border] searches."); *Mejia*, 720 F.2d at 1382; *United States* v. *Sanders*, 663 F.2d 1 (2nd Cir. 1981).

cuits use reasonable suspicion as a "flexible standard"[25] which adjusts the strength of suspicion necessary for a particular search to the intrusiveness of the invasion in a particular case. While "reasonable suspicion" will justify a strip search, more "reasonable suspicion" is necessary for a body cavity search.[26]

> 'the greater the intrusion, the greater must be the reason for conducting a search that results in such invasion.' . . . Thus, what constitutes 'reasonable suspicion' to justify a particular search may not suffice to justify a more intrusive or demeaning search.

United States v. *Afanador*, 567 F.2d 1325, 1328 (5th Cir. 1978) (citations omitted), quoted with approval in *Sandler*, 644 F.2d at 1166.

Although the Ninth, Fifth and Eleventh Circuits are not using the same labels, they are speaking the same language, they are operating under the same assumptions, they are applying the same principles and they are achieving the same results.[27]

Petitioner states:

> the 'clear indication' threshold imposed by [the Ninth Circuit] for detaining suspected alimentary canal smugglers

[25] *Sandler*, 644 F.2d at 1166; *Vega-Barvo*, 729 F.2d at 1344.

[26] *Id.* at 1351 (dissenting opinion, characterizing majority opinion).

[27] In *Briones*, 423 F.2d 742, the most recent Fifth Circuit case involving an internal body search at the border, for example, a stomach pumping by administration of an emetic was sustained where a confidential informer who had proved reliable in the past informed customs that Briones would attempt to smuggle heroin into the United States. The customs agent had personal knowledge that Briones was a heroin addict. Briones and a companion attempted to enter the United States when and where the informer predicted. In upholding the administration of the emetic, the court, noting that the Ninth Circuit required a "clear indication," explicitly declined to specify what standard was applicable, merely noting that "the search . . . was reasonable under either standard." *Id.* at 744;

See also Vega-Barvo, 729 F.2d at 1345 (approving the result reached in *Briones* based upon "the greater quantum of suspicion provided by the informant's tip.")

> . . . is impractical. . . . [A]limentary canal smuggling does not ordinarily leave . . . readily observable external signs. See *United States* v. *Mendez-Jimenez*, 709 F.2d at 1303. Consequently, imposition of the higher 'clear indication' standard would, as in this case, almost invariably require the release into this country of persons believed to be engaged in alimentary canal smuggling. . . .

Pet. 16 n.16; Br. for Pet. 31-34.

This statement is not supported by the facts. First of all, not even the reasonable suspicion standard would have prevented Rosa Elvira Montoya de Hernandez from being "released into this country." As respondent points out, (pages 39-43, *infra.*), the objective, articulable and particularized facts known to the customs officers would not have supported her continued detention under the standard currently employed in any circuit.

Secondly, *Mendez-Jimenez*,[28] the case petitioner relies on in support of his statement, strongly supports the opposite conclusion. In *Mendez-Jimenez*, objective and articulable facts showed a "clear indication" of alimentary canal smuggling. An affidavit containing those facts was presented to a magistrate. The magistrate issued a court order authorizing an x-ray examination of the suspect. The x-rays revealed foreign objects. The suspect was detained until he passed balloons containing cocaine. The conviction was sustained on appeal by the Ninth Circuit. The language from *Mendez-Jimenez* referred to by petitioner, *viz.*, ". . . it should be noted that smuggling by ingestion into the alimentary canal does not leave the external signs that body cavity (e.g., rectum or vagina) smuggling does," *Id.* at 1303, Br. for Pet. 32, was used by the Ninth Circuit only in the context of pointing out that in evaluating whether the facts establish a "clear indication," the court should take into account what factors experienced customs officers have considered to be indicative of such smuggling. *Id.*

[28] *Mendez-Jimenez*, 709 F.2d 1300.

at 1302-03.[29] *Mendez-Jimenez* is not atypical of Ninth Circuit jurisprudence in this area.[30]

II. THE DETENTION OF MS. de HERNANDEZ WAS UNREASONABLE

A routine border search will of necessity involve a brief temporary detention incident thereto.[31] The "reasonableness" of a more prolonged detention will require a balancing of the interests of the government against the rights of the individual. As the intrusiveness of the particular police procedure under review increases, the amount of suspicion necessary to justify the intrusion correspondingly increases. This approach balances the privacy interests of the international traveler against the government's interest in preventing the introduction of contraband at the border.[32]

Petitioner contends that in doing this balancing, the Court should apply a "relaxed standard" of reasonableness in assessing government action in the border context.[33] Application of such a standard in cases involving more intrusive border

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[29] In so doing, the Ninth Circuit is following this Court's example in *United States* v. *Cortez*, 449 U.S. 411, 418 (1981).

[30] The number of body cavity searches of suspected drug smugglers that have been upheld by the Ninth Circuit, using the "clear indication" standard, is enlightening. *See, e.g., United States* v. *Shreve*, 697 F.2d 873 (9th Cir. 1983); *United States* v. *Couch*, 688 F.2d 599 (9th Cir. 1982); *United States* v. *Ek*, 676 F.2d 379 (9th Cir. 1982); *United States* v. *Purvis*, 632 F.2d 94 (9th Cir. 1980); *Aman*, 624 F.2d 911; *United States* v. *Erwin*, 625 F.2d 838 (9th Cir. 1980); *United States* v. *Mastberg*, 503 F.2d 465 (9th Cir. 1974). *But cf. Quintero-Castro*, 705 F.2d 1099 (the facts of *Quintero-Castro*, however, would not have supported an x-ray search even under the "flexible" reasonable suspicion standard employed by the Fifth and Eleventh Circuits. *See Mendez-Jimenez*, 709 F.2d at 1304.

[31] *United States* v. *Espericueta-Reyes*, 631 F.2d 616, 621-22 (9th Cir. 1980).

[32] *See Camara* v. *Municipal Court*, 387 U.S. 523, 536-537 (1967).

[33] Br. for Pet. 10, 14, 20.

searches and seizures, such as the one now before the Court, is unprecedented, even in the Fifth and Eleventh Circuits, where a "flexible standard" of reasonable suspicion is employed.[34]

The "relaxed standard" of reasonableness petitioner proposes is already reflected in the "border search exception," which itself excuses law enforcement officers from the normal warrant and probable cause requirements of the Fourth Amendment, and subjects travelers crossing the border to routine searches and seizures. More intrusive searches and seizures, as previously noted, implicate important and fundamental human values, and therefore the reasonableness standard[35] developed by this Court in non-border cases involving detentions based upon suspicion less than probable cause applies.[36]

A. The Detention Of Ms. de Hernandez Was More Intrusive Than A Full Custodial Arrest.

Sixteen hours of *incommunicado* involuntary confinement is not a minimal invasion of one's dignity and privacy.[37] Although petitioner contends that the detention in this case was

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[34] *See* pages 13-14, *supra*.

[35] As this Court recently stated: ". . . the underlying command of the Fourth Amendment is always that searches and seizures be reasonable. . . ." *New Jersey* v. *T.L.O.*, ___ U.S. ___ (1985), 36 Crim.L. Rep. (BNA) 3091, 3094.

[36] *See, e.g., Terry* v. *Ohio*, 392 U.S. 1 (1968); *Brignoni-Ponce*, 422 U.S. 873 (1975); *Martinez-Fuerte*, 428 U.S. 543; *United States* v. *Mendenhall*, 446 U.S. 544 (1980); *Reid* v. *Georgia*, 448 U.S. 438 (1980); *Florida* v. *Royer*, 460 U.S. 491 (1983); *United States* v. *Place*, ___ U.S. ___ (1983), 33 Crim. L.Rep. (BNA) 3186; *T.L.O.*, ___ U.S. ___ (1985), 36 Crim.L.Rep. (BNA) 3091; *Hayes* v. *Florida*, No. 83-6766 (Mar. 20, 1985); *United States* v. *Sharpe*, No. 83-529 (Mar. 20, 1985); *Winston* v. *Lee*, No. 83-1334 (Mar. 20, 1985).

[37] This Court has recognized the fundamental nature of "every man's constitutional right to liberty," *O'Connor* v. *Donaldson*, 422 U.S. 563, 573 (1975), and has been particularly sensitive to *incommunicado* involuntary police detentions. *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

no more intrusive than a strip search,[38] respondent submits that, under the facts of this case, the intrusiveness of this detention exceeded the intrusiveness of a full-scale custodial arrest.

Had Ms. de Hernandez been arrested, she would at least have been allowed the solace of a telephone call to a family member, a friend, a loved one, or a lawyer. Had she been arrested, after routine processing at the police station, she would have been assigned to a cell where she would have been able to lie down on a bed with a mattress. She would not have been required to sit upright in an office chair under constant observation by strangers.[39] Had she been arrested, she would have been entitled to be taken without unnecessary delay

[38] Pet. 14-16, Br. for Pet. 11, 19, 24-25, 26, 31, 34 ("relatively minor intrusion"). This is petitioner's most fundamental contention. Petitioner agrees that the question presented for this Court is the lawfulness of the detention (Br. for Pet. I). Petitioner argues that it was reasonable to detain Ms. de Hernandez for the period of time she was detained. The lower court should be reversed, petitioner argues, because that court required a higher level of suspicion for the detention than was necessary under the circumstances. A lower standard of suspicion is warranted, petitioner contends, because "such an imposition does not differ significantly from a strip search." (Pet. 16, Br. for Pet. 11).

Petitioner avoids squarely addressing the reasonableness of the detention in this case by focusing attention on the search of Ms. de Hernandez' bodily waste (". . . the inspection of a suspect's body wastes does not involve an intrusion . . . and does not threaten harm or pain . . .") Br. for Pet. 25. Respondent submits that this case is not about the inspection of excrement.

[39] The Court has recognized the enormous toll that psychological as well as physical stress takes on the human spirit in connection with involuntary police detentions. *Leyra* v. *Denno*, 347 U.S. 556 (1954).

And it is our humanity, as well as the contents of our pockets, that the Fourth Amendment protects:

> The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. *Schmerber* v. *California*, 384 U.S. 757, 767 (1966).
>
> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of [the Fourth Amendment's protections]. *Boyd* v. *United States*, 116 U.S. 616, 630 (1886).

before the nearest federal magistrate,[40] where she would have been advised by a neutral and independent judicial officer of the charges against her, where an attorney would have been appointed for her if she could not afford to retain one, and where the question of bail would have been addressed.

Extended involuntary *incommunicado* detentions "for investigation" are the hallmark of a police state, not a free society. Such detentions have been condemned by this Court. *Davis* v. *Mississippi*, 394 U.S. 721, 726-27 (1969).[41] Although this Court did permit the detention of a person for the length of time necessary to complete a search in *Michigan* v. *Summers*, 452 U.S. 692 (1981),[42] a critical fact distinguishes the two cases. In *Davis*, during the detention, incriminating evidence was obtained *from the suspect himself*, whereas, in *Summers*, although evidence was obtained during the period of the detention, the evidence obtained was not a *product of the detention*. In *Summers*, this Court was careful to point out that ". . . the type of detention imposed here is not likely to be exploited by the officer or unduly prolonged in order to gain more informa-

[40] Rule 5, Federal Rules of Criminal Procedure; *see* 18 U.S.C. § 3501(c); *McNabb* v. *United States*, 318 U.S. 332, 342 (1942); *Mallory* v. *United States*, 354 U.S. 449, 451-52 (1957); *United States* v. *Jernigan*, 582 F.2d 1211, 1213 (9th Cir. 1978); *United States* v. *Sotoj-Lopez*, 603 F.2d 789, 790-91 (9th Cir. 1979) (government claim that an alien arrested and detained pending a determination of deportability has no Rule 5 rights. Conviction reversed).

[41] *Davis* involved the seizure, transportation and involuntary detention of a suspect for the purpose of obtaining his fingerprints. This Court reversed the resulting conviction, holding that the detention violated the suspect's Fourth Amendment rights. *See also Hayes* v. *Florida*, No. 83-6766, (Mar. 20, 1985).

[42] *Summers* involved a "routine detention of residents of a house while it was being searched for contraband pursuant to a valid warrant." 452 U.S. at 705 n.21.

tion, because the information the officers seek normally will be obtained through the search and not through the detention." *Id.* at 701. The Court also noted that ". . . special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case, . . ." *Id.* at 705 n.21.

B. The Purpose Of The Detention Was To Gather Incriminating Evidence

Although Ms. de Hernandez was actually detained for more than 27 hours before she was formally arrested,[43] the opinion of the Ninth Circuit Court of Appeals in this case focused on the first 16 hours of that period.[44] In scrutinizing the length of the detention, the Ninth Circuit excluded as presumptively "reasonable" the period of time between the point at which the customs officers first began good faith efforts to obtain a court order, and the time the procedure ordered was accomplished.[45] This was consistent with the Ninth Circuit's judicially developed rule preferring court orders[46] for the most intrusive searches at the border.

The Ninth Circuit has permitted lengthy and intrusive detentions in border search cases involving suspected drug

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[43] Respondent maintains that Ms. de Hernandez' detention matured into a *de facto* full custodial arrest during the 16 hour detention after the first strip search showed no evidence of contraband.

[44] Agent Windes testified that he took no positive steps to obtain a court order until 4:00 p.m. on March 5. J.A. 23.

[45] This was a period of approximately eleven hours. J.A. 40, 51.

[46] Although no authority may be derived for such orders from a reading of the Fourth Amendment, United States District Courts have broad powers under the All Writs Act, 28 U.S.C. § 1651, to issue such orders. *See, e.g., United States* v. *New York Telephone Company*, 434 U.S. 159, 168-174 (1977).

Respondent submits that a court order should be a mandatory prerequisite for x-ray searches for the reasons set forth in n. 50, *infra*.

smugglers,[47] but only when the detention has been incidental to a legitimate police purpose consistent with the Fourth Amendment's protection of the individual, and was not for the purpose of eliciting further incriminating information from the person detained.

What made the police tactics so egregious in *Dunaway* v. *New York*, 442 U.S. 200 (1979), was not the seizure or the asportation or the length of the detention, but the fact that the police seized an individual they had no cause to arrest *for purposes of further investigation*.[48] It is this element of improper police motive that is also present in the case *sub judice*. As the court below correctly noted, the agents, not having a sufficient factual basis to obtain a court order for an x-ray examination after the first strip search failed to produce evidence of contraband, decided "to wait for nature to provide the stronger evidence that would support an order."[49]

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[47] *United States* v. *Faherty*, 692 F.2d 1258, 1260 (9th Cir. 1982) (six hours); *Couch*, 688 F.2d at 604 (seven and one-half hours); *Ek*, 676 F.2d at 381 (ten to twelve hours); *Espericueta-Reyes*, 631 F.2d at 621-22 (fifty minute detention approved in extended border search where period of time was deemed incidental to returning suspects to the border for further inquiry. *Id.* at 619, 622); *Erwin*, 625 F.2d at 841 (seven hours).

[48] In *Dunaway*, "further investigation" involved interrogation of the suspect. Police officers in that case picked up a suspect they did not have probable cause to arrest, drove him to police headquarters, and questioned him about his involvement in a crime. The suspect eventually made statements incriminating himself in the crime. This Court reversed the resulting conviction. *Id.* at 219.

[49] Pet. App. 4a. This conclusion by the court below is amply supported by the facts in the record, and also by simple logic and common sense. The evidence indicates that the customs officers who interviewed Ms. de Hernandez at the secondary inspection area asked their superiors to apply to the court for a court-ordered x-ray at that time. Their superiors declined to do so. Yet, sixteen hours later, after a lengthy detention had elicited incriminating evidence from Ms. de Hernandez, the same superiors then applied for and obtained a court order. "The application for the court order contained information gleaned during the 16 hour detention . . ." Pet. App. 3a-4a.

Following the example of *Dunaway*, and making ample allowances for the needs of law enforcement officers at the border, the Ninth Circuit has established a rule of reason which evaluates the length of the detention in light of the purposes to which the law enforcement officers put the time during which the suspect is detained. Since the Ninth Circuit has established a strong preference for court orders for the most intrusive searches at the border,[30] lengthy periods of detention are upheld as "reasonable" provided that customs agents are using the time in a good faith effort to obtain a court order. *Erwin*, 625 F.2d at 841; *Ek*, 676 F.2d at 382, 383 n.5; *Faherty*, 692 F.2d at 1260; *Couch*, 688 F.2d at 602 (". . . the purpose of the detention [here] was to secure a warrant, not to elicit information.")

[30] The Ninth Circuit rule, which holds that a warrant is merely one factor to be considered in determining the reasonableness of the search, is sound policy, and is firmly grounded in common sense based upon practical experience. Violence is not unknown to the history of customs officers' attempts to perform intrusive body searches upon reluctant, frightened and even criminal travelers at the border. *See, e.g., Blackford*, 247 F.2d 745; *Rivas*, 368 F.2d 703.

The Ninth Circuit's preference for court orders may be traced to *Cameron*, 538 F.2d 254. The facts in *Cameron* demonstrate the potential for violence in this area of the law. *See* 538 F.2d at 255-57.

The *Cameron* court noted that a court order has the following benefits: a neutral and independent judicial officer can review the facts allegedly justifying the search, and can assist in assuring that it is conducted in a reasonable manner; a court order serves to dispel the apprehensions of the traveler who may be frightened, who may fear that the procedures are not totally lawful, or who may be concerned that he or she is being singled out at the customs officer's whim; it advises the suspect that authorization for the search has been obtained from a judicial officer, and hence is presumptively lawful; it defines the scope of the search so that the suspect will know exactly what procedures he or she faces. Finally, and most importantly, a court order serving these purposes may well secure the cooperation of an otherwise reluctant suspect. *Id.* at 259. *(See, e.g., Aman*, 624 F.2d at 913; *Illinois* v. *Gates*, 462 U.S. 213, 236 (1983). *See also Breithaupt* v. *Abram*, 352 U.S. 432, 441, 443 (1957) (Warren, C.J., and Douglas, J., dissenting separately) (pointing out that, under the majority's opinion, the result would have been different if the suspect had been conscious and had physically resisted the taking of his blood.)

The initial 16 hours of Ms. de Hernandez' detention, by contrast, had no other purpose than to produce incriminating evidence lacking at the outset. The circumstances of the detention[51] negate any argument that the customs agents were merely holding her pending the next available flight back to Colombia. A detention, like a search, may not be justified by what it turns up.[52]

The rule of reason established by the Ninth Circuit for the prolonged detention of suspected body cavity smugglers strikes an appropriate balance between the rights of the individual and the interests of the state. Respondent urges this Court to adopt the Ninth Circuit's rule and apply it to the facts of the case at bar.

Petitioner disagrees, and proposes a different rule:

> . . . the propriety of the detention should turn on the lawfulness of the search that necessitates the detention.

Br. for Pet. 11.

Petitioner puts the matter exactly backwards. In fact, the lawfulness of the search often turns on the propriety of the manner in which it is carried out.[53]

Petitioner contends that a person suspected of internal body smuggling at the border may be detained for whatever period of time is necessary to complete the search.[54] While admirable

[51] Constant visual surveillance, and the imposed requirement, should Ms. de Hernandez desire to move her bowels, that she excrete while under observation into a wastebasket instead of privately into a toilet. *See* page 6, *supra*. *See also* page 21 and n.49, *supra*.

[52] *See United States* v. *Di Re*, 332 U.S. 581, 595 (1948).

[53]

> As we observed in *Terry*, [392 U.S. 1] '[t]he manner in which the seizure . . . [was] conducted is, of course, as vital a part of the inquiry as whether [it was] warranted at all.'

Place, ___ U.S. ___ (1983), 33 Crim.L.Rep. (BNA) at 3189; *Kremen* v. *United States*, 353 U.S. 346 (1957).

[54] Petitioner's brief continually returns to the same theme. *See* Br. for Pet., 20-21, 24 n.20, 26-27 ("[I]t is ordinarily permissible to detain a person for the length of time reasonably necessary to perform a lawful search, . . .")

in its simplicity, this argument totally fails to consider that this Court has repeatedly held that a seizure reasonable at its inception may become unreasonable because of the length of the subsequent detention.[55] Furthermore, the adoption by the Court of the rule suggested by petitioner would leave the severity of the intrusion in border searches totally within the unfettered discretion of the law enforcement officer.[56]

C. Ms. de Hernandez Did Not Consent To Be Detained

Petitioner argues that this was not an unreasonably intrusive or prolonged detention subject to the unconstrained

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[55] *See, e.g., Florida* v. *Royer*, 460 U.S. 491 (1983), where a suspect who fit the "drug courier profile" was detained at airport for 15 minutes on agents' suspicion he was carrying narcotics. After brief initial questioning showed suspect to be traveling under an assumed name, the agents, still in possession of suspect's tickets and driver's license, asked suspect to accompany them to a small room for further investigation. Agents retrieved suspect's baggage, which was found to contain marijuana.

This Court, affirming reversal of the resulting conviction, and agreeing that a reasonable suspicion justified a seizure and temporary detention of the person, held that "[w]hat had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room, where the police, unsatisfied with previous explanations, sought to confirm their suspicions." *Id.* at 503.

* * *

". . . [T]he police [may not] seek to verify their suspicions by means that approach the conditions of arrest." *Id.* at 499.

In so holding, the Court emphasized that:

"It is the *State's burden* to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Id.* at 500. (Emphasis added). *See also Place*, ___ U.S. ___ (1983), 33 Crim.L.Rep. (BNA) at 3189. (90 minute airport detention on reasonable suspicion that luggage contained narcotics, held unreasonable. "The length of the detention . . . alone precludes the conclusion that the seizure was reasonable in the absence of probable cause." *Id.*).

[56] *See, e.g., Delaware* v. *Prouse*, 440 U.S. 648 (1979) (police officers making random stops of automobiles on the highway for license and registration checks; conviction reversed. "This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the [law enforcement] official in the field be circumscribed, at least to some extent.") *Id.* at 661; *Brown* v. *Texas*, 443 U.S. 47 (1979).

Because the "border search exception" relieves law enforcement officers of the need to have either a warrant or probable cause, it is particularly important that courts establish concrete, identifiable standards which restrain law enforcement officers from invading the most sacrosanct areas of a traveler's privacy at whim. Although we can assume that most law enforcement officers are decent and honorable persons, they are all nevertheless "engaged in the often competitive enterprise of ferreting out crime," *Johnson* v. *United States*, 333 U.S. 10, 14 (1948), and in their zealous pursuit of this objective can be expected to strain against the harness imposed by the Fourth Amendment.

discretion of the customs officers because Ms. de Hernandez, not the government, controlled the length of her detention.[57] Petitioner further contends that:

> . . . a suspect cannot complain of the intrusiveness of the detention if he selected detention over the alternative of an x-ray search.

Br. for Pet. 28. These arguments fail to withstand closer examination.

Petitioner's statements contain a dual implication: first, that by choosing between two alternatives, Ms. de Hernandez somehow "consented" to what happened to her, and second, that she had the key to her release in her own pocket. By failing to use it, petitioner argues, she cannot later "complain."

Ms. de Hernandez was offered two alternatives: 1) an x-ray examination, or 2) involuntary confinement for an indefinite period until she excreted bodily waste. For a woman who

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[57] Br. for Pet. 11, 27, 28-30.

stated she was four weeks pregnant,[58] the "choice" could well be described as: sixteen hours of torture or a dose of poison.[59]

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[58] We now know that Ms. de Hernandez was not only lying, she was attempting to smuggle narcotics. It is tempting, in retrospect, to view the choices confronting Ms. de Hernandez, and to do the requisite balancing of interests in determining the reasonableness of the police conduct, with an eye toward preventing the release of a clearly guilty felon, and making certain that a single criminal gets her just deserts.

The problem with adopting this point of view is that Fourth Amendment cases simply do not reach this Court with innocent defendants in tow. Since the Fourth Amendment standards established here will be applied to the innocent and guilty alike, it would seem to serve no useful purpose to examine Ms. de Hernandez' "choices" or establish Fourth Amendment standards of "reasonableness" on the basis of her subsequently discovered guilt.

If all suspects were guilty, there would be no need for the Bill of Rights at all. The facts, regrettably, show that this is not true. (See page 38 and n.88, *infra.*).

Respondent reads with pain petitioner's statement that "[w]e have little doubt that most innocent travelers . . . would elect a prompt x-ray as the means of dispelling suspicion and gaining entry into the country." Br. for Pet. 28. The clear implication of petitioner's statement is that only a guilty person would refuse to consent to an x-ray. Although petitioner stops short of saying Ms. de Hernandez' refusal to consent created additional suspicion thus justifying further detention, it is nevertheless a sad day when the Solicitor General takes the position before this Court that only the guilty would object to intrusions on their privacy and dignity.

One need not be guilty to claim the protections of the Bill of Rights. And claiming those protections is no evidence of a guilty mind. *See Doyle* v. *Ohio*, 426 U.S. 610, 617 (1976) (exercise of Fifth Amendment privilege to remain silent is "insolubly ambiguous" and cannot be commented on by the prosecutor as being evidence of guilt.)

[59] This is neither exaggerated nor melodramatic. The following passage is taken verbatim from *Vega-Barvo*, 729 F.2d at 1348, a case decided recently in the circuit petitioner considers to be the repository of enlightened jurisprudence in the area of border searches:

> Several weeks after she was x-rayed, Vega-Barvo discovered she was pregnant. Not knowing this fact at the time of the x-ray, she had answered no to the doctor's inquiry on this matter. Since the question was asked, it must be assumed the x-ray would not have been conducted if the doctors knew she was pregnant. When she readvised the same doctors of her condition, they suggested she abort the fetus because it may have been damaged by the x-rays. She followed the doctor's advice.
>
> Despite these *unfortunate circumstances*, there is insufficient record evidence of the normal medical dangers of x-rays to support a conclusion that an x-ray search is more intrusive than a strip-search. (Emphasis added).

This, as the court below accurately characterized it, was nothing more than a Hobson's choice.[60]

When a traveler crossing the border is offered two intrusive and offensive choices, both of which are substantial invasions of her personal privacy and dignity, nothing in logic or common sense decrees that when she "selects" the less objectionable, by doing so, she is later disqualified from complaining that the one she opted for violated her rights. If petitioner's claims were in fact true, the police could effectively close the courthouse door to complaints of Fourth Amendment violations simply by offering every suspect two choices, one of which would be so painful or outrageously intrusive that the other would pale by comparison. "Choice" of the lesser of the two evils would thereafter preclude a complaint about either. Fourth Amendment violations could be preserved only by those who acted against their enlightened self-interest by submitting to unbearable tortures. Therefore, petitioner's arguments on this point make no logical or legal sense.[61]

There *is* a way in which a traveler's choice of one intrusive option instead of another could have a bearing on the reasonableness of the search or seizure.

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[60] Pet. App. 5a; Thomas Hobson, *circa*, 1631; English liveryman who required every customer to take the horse nearest the door: an apparently free choice when there is no real alternative. *Webster's Ninth New Collegiate Dictionary*, 1984; *See Simmons* v. *United States*, 390 U.S. 377, 391-94 (1968).

[61] The dissenting judge in the court below may have been the inspiration for petitioner's contentions, when he stated: ". . . though de Hernandez may have suffered 'many hours of humiliating discomfort,' she was herself solely responsible for a considerable part of it." Pet. App. 9a.

Consider the following problem:

Suppose X crosses the border. A customs agent develops a level of suspicion concerning X that will justify a strip search, but will not justify a body cavity search. The customs agent offers X the option of submitting to either one. If X chooses the lesser of the intrusive options, and later complains that his Fourth Amendment rights were violated, the reasonableness of the search will, of course, be judged by whether the officer had a level of suspicion sufficient to justify that option. If X chooses the *more* intrusive option, however, the reasonableness of the search will still be judged by whether the *lesser* of the intrusive options was justified. The fact that X chose the more intrusive option cannot deprive the government of the fruits of the search to which it was legally entitled.

The hypothetical situation may or may not have significance for the case at bar. If, and only if, an x-ray search would have been less intrusive than the sixteen hour involuntary confinement that Ms. de Hernandez suffered,[62] then the fact that she refused the x-ray and opted for the detention becomes important, because the Court can weigh the level of suspicion possessed by the customs inspectors against the less intrusive option she refused in deciding whether the conduct of the customs agents was reasonable under the circumstances.[63]

The intrusiveness of x-ray examinations has been addressed by the circuit courts of appeal. There is a split in the circuits on

[62] Petitioner steadfastly maintains throughout his brief that the detention Ms. de Hernandez endured in this case, an x-ray search, and a strip search are all *equally* intrusive. ("an x-ray search involves an invasion of privacy no greater than that attendant to a strip search: . . ." Br. for Pet. 28; ". . . the quantum of suspicion required to conduct a strip search is all that is required to permit a detention of the type at issue in this case." *Id.* at 31, 11, 24-25, 26, 28, 34; "a reasonable suspicion of alimentary canal smuggling is sufficient to justify an x-ray search as well as detention." *Id.* at 28.

[63] Assuming, *arguendo*, that an x-ray search is less intrusive than prolonged involuntary confinement of the type suffered by Ms. de Hernandez, there is much to be said for this reasoning. The Eleventh Circuit, having

the issue. The Ninth Circuit has determined that x-ray searches are as intrusive as body cavity searches and require a comparable level of suspicion to justify their initiation.[64] The Eleventh Circuit has determined that x-ray searches are no more intrusive than strip searches and require a comparable level of suspicion to justify their initiation.[65] Both circuits agree, however, that the intrusiveness of an x-ray examination is directly related to the medical dangers incident thereto.[66]

This Court is not in a position to make an authoritative disposition of that particular issue, however, because there is

decided in *Vega-Barvo*, 729 F.2d 1341, that x-ray searches are no more intrusive than strip searches, addressed this very issue in *United States* v. *Mosquera-Ramirez*, 729 F.2d 1352 (11th Cir. 1984).

Petitioner cites *Mosquera-Ramirez* for the proposition that the type of detention procedure employed here is no more intrusive than an x-ray search. Br. for Pet. 19. The facts of that case reveal that Mosquera-Ramirez' articulably suspicious behavior (*see* page 40, *infra*) caused customs agents to reasonably suspect him of smuggling narcotics internally as he crossed the border. He refused to consent to an x-ray. No court order was sought (nor is one recognized in the Eleventh Circuit). Mosquera-Ramirez was detained at a local hospital for twelve hours until he began excreting cocaine-filled condoms, at which point he was arrested.

Contrary to petitioner's contention, the Eleventh Circuit in *Mosquera-Ramirez* implicitly recognized that the ordeal that Mosquera-Ramirez endured in a twelve hour involuntary detention was more intrusive than an x-ray, but also realistically acknowledged that forcing an x-ray examination on an unconsenting or resisting suspect is not feasible. *Id.* at 1356.

[64] *Ek*, 676 F.2d at 382.

[65] *Vega-Barvo*, 729 F.2d at 1348-49.

[66] "Vega-Barvo argues . . . that despite the x-ray's inoffensive nature, its medical dangers control the intrusiveness issue. It must be conceded without need for analysis that as medical danger increases because of a search procedure, so must the reasons for conducting the procedure." *Id.* at 1348.

"We hold that the stricter standard required for a body cavity search also applies to an x-ray search. An x-ray search, although perhaps not so humiliating as a strip search, nevertheless is more intrusive since the search is potentially harmful to the health of the suspect." *Ek*, 676 F.2d at 382 (footnote omitted).

not a scintilla of evidence in this record on the question, nor was it briefed or argued in either court below.[67]

Given the current state of the record in this case, the Court has two options. First, the Court could assume, as petitioner urges,[68] and without deciding the question, that the intrusiveness of Ms. de Hernandez' detention was equal to the intrusiveness of an x-ray examination. With that assumption, issues involving the intrusiveness of x-ray searches disappear and the Court is free to squarely confront and assess the reasonableness of the detention in this case. Adopting this course of action would effectively negate the significance of the option not pursued here by Ms. de Hernandez (consent to an x-ray examination), and would confine the decision in this case to the facts in the record before the Court.

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[67] Petitioner's brief on the merits repeatedly invites the Court to incorporate by reference petitioner's brief in opposition to petition for a writ of certiorari in *Vega-Barvo*, 729 F.2d 1341, *cert. denied*, ___ U.S. ___, 36 Crim.L.Rep. (BNA) 4133 (Dec. 10, 1984). Br. for Pet. 19 n.13, 26 n.21, 28, 31 n.27).

That brief, provided to respondent by petitioner, contains factual information concerning the medical dangers posed by routine abdominal x-rays, including quotations from and citations to medical journals and expert medical authorities.

Petitioner asks this Court to take that brief into consideration in evaluating the intrusiveness of x-ray examinations in this case ("x-ray examinations . . . are not viewed as a health hazard by either the public or the medical profession. See our brief in opposition in *Vega-Barvo* v. *United States*, *supra*, at 7-11.") Br. for Pet. 28.

Respondent has grave concerns about the propriety of the procedure petitioner invites this Court to pursue. Petitioner's *Vega-Barvo* brief contains evidence which pertains to an issue raised by petitioner in his brief in this case, on which there is no evidence whatsoever in the record now before the Court. The upshot of petitioner's action is to provide this Court with factual information which is outside the record, which was not considered by either court below and which pertains directly to an issue petitioner raises for the first time in his brief to this Court.

[68] See page 28 n. 62, *supra*.

The second option open to the Court assumes that the Court wishes to reach out and make an authoritative nationwide determination on the intrusiveness of x-ray examinations, based upon an evaluation of the medical dangers posed by exposing humans to x-ray radiation. Respondent respectfully submits that if the Court is determined to follow this course of action, the Court must remand this case to the district court from whence it came where evidence can be taken, and where both sides will have a full and fair opportunity to develop the record on that question.

D. Ms. de Hernandez Was Entitled To The Same Fourth Amendment Rights As A Returning Citizen[69]

1. Aliens And Immigration Procedures

Petitioner makes the following argument: immigration laws provide that an alien seeking admission to this country may be excluded on a variety of grounds, and may lawfully be detained for further inquiry pending a decision on whether the alien may enter. As a result of the "general awareness" of such procedures, an alien seeking to enter has a "drastically limited" reasonable expectation of privacy and liberty at the border.[70] Because an alien's expectation of privacy is less, the intrusiveness of the search or seizure is less, which in turn lowers the quantum of suspicion necessary to sustain the search or seizure as "reasonable under the circumstances." Therefore, petitioner argues, Ms. de Hernandez' lengthy involuntary confinement was not unreasonably intrusive under the circumstances because she was an alien.[71]

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[69] This issue was not raised, briefed or addressed by either party or either court below. Both courts below appear to have assumed that Ms. de Hernandez had the same Fourth Amendment rights as a returning citizen. Nevertheless, respondent agrees with petitioner that it is an issue that is fairly presented by the facts and record in this case.

[70] Br. for Pet. 35.

[71] Br. for Pet. 12, 24, 34-37.

Whatever the merits of petitioner's argument may be in the abstract, it has no applicability whatsoever to the facts of this case. Ms. de Hernandez was undeniably and incontrovertibly admitted to this country by immigration officers at the immigration checkpoint.[72] As an admitted alien, whether she was here on a temporary visa or a work permit,[73] she was entitled to the same expectation of privacy and the same Fourth Amendment rights as a citizen. While the fact of alienage may have relevance to an individual's reasonable expectation of privacy during immigration procedures, it has no relevance once those procedures are completed and the individual is admitted. Customs inspections, on the other hand, have an equal impact on the reasonable expectation of privacy of aliens and citizens alike.[74]

2. Aliens And The Criminal Sanction

This Court has never decided whether aliens suspected of criminal activity may be given different treatment than citizens at the border. There is no question that a sovereign has the inherent plenary power to exclude aliens completely, for any reason or for no reason at all, and can prescribe the conditions for their entry. *Kleindienst* v. *Mandel*, 408 U.S. 753, 762, 765-66 (1972).

Moreover, even aliens inside our borders are not entitled to enjoy all the advantages of citizenship, and may be denied the privileges, immunities and benefits to which citizens are entitled. *Matthews* v. *Diaz*, 426 U.S. 67, 78 n.12, 79-80 (1976).

Although aliens have no constitutional right to enter the country, once admitted, they enjoy the same fundamental

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[72] *See* page 1, *supra*.

[73] *Almeida-Sanchez*, 413 U.S. at 267.

[74] *See* pages 33-36, *infra*. The only cases cited by petitioner in support of his argument are *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Landon* v. *Plasencia*, 459 U.S. 21 (1982). Br. for Pet. 35 n.30. Both cases involved immigration exclusion proceedings, and are therefore totally inapposite to the facts of this case.

constitutional rights as citizens. This Court has held that aliens, even those whose presence in the country is unlawful, involuntary or transitory, are entitled to due process of law under the Fifth and Fourteenth Amendments. *See Diaz*, 426 U.S. at 77.[75]

In *Plyler* v. *Doe*, 457 U.S. 202 (1982), the Court held that aliens residing in this country illegally, who are subject to suffer deportation or criminal sanction at any time because of their undocumented status, are nevertheless entitled to a free public education for their children, even though public education is not a Constitutionally guaranteed right. *Id.* at 221. The government in *Doe* argued that although the Fourteenth Amendment forbids the states from depriving "any person within its jurisdiction" of equal protection of the laws, undocumented aliens were not "persons within the jurisdiction" and therefore they had no right to equal protection of the laws. To which this Court responded:

> We reject this argument. Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term.

Id. at 210.

The language of the Fourth Amendment protects "people." When the Framers meant to say "citizens", they did so.[76]

The Equal Protection Clause of the Fourteenth Amendment provides that: "[n]o State shall deprive . . ." and does not, by its terms, inhibit Congress from acting to deprive persons of

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[75] An alien who has been admitted, or who is otherwise physically within the country, even illegally, is generally entitled to the greater substantive rights and procedural protections of a deportation hearing. *Plasencia*, 459 U.S. at 25-27; *Mezei*, 345 U.S. at 212.

By contrast, aliens seeking entry at the border have been described as having "no rights" in immigration exclusion proceedings. *Mezei*, 345 U.S. at 221 and n.4.

[76] The Constitution protects the privileges and immunities only of citizens. Fourteenth Amendment, § 1; *See* Art. IV § 2, cl. 1.

equal protection of the laws. There is no language in the Fifth Amendment guaranteeing persons equal protection of the laws. Nevertheless, this Court has held that while Fourteenth Amendment notions of equal protection are not entirely congruent with Fifth Amendment concepts of due process, invidious discrimination where fundamental rights[77] are involved makes the Equal Protection Clause applicable to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497, 499-500 (1954).

This Court long ago recognized that the distinction between immigration proceedings and criminal proceedings is a critical one for the rights of the alien. In *Wong Wing* v. *United States*, 163 U.S. 228 (1896), the Court considered an Act of Congress which, in an attempt to discourage the influx of illegal aliens, provided that any alien found to be unlawfully in the country "shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States."[78] The Court acknowledged that the right to exclude or expel aliens "is an inherent and inalienable right of every sovereign"[79] and that such power "may be exercised entirely through executive officers" in summary proceedings.[80]

Where the alien is to be subjected to punishment and to the stigma of the criminal sanction, however, *Wong Wing* held that the alien is entitled to those fundamental procedural due proc-

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[77] In *Mapp* v. *Ohio*, 367 U.S. 643 (1961), this Court held that the Fourth Amendment's protection against unreasonable searches and seizures is so fundamental to a system of ordered liberty as to be enforceable against the States through the Due Process Clause of the Fourteenth Amendment.

[78] 163 U.S. at 233-34.

[79] *Id.* at 231.

[80] *Id.* at 231, 235-36 (deportation is not punishment for a crime, and detention pending deportation is not imprisonment in the legal sense); *See Bell* v. *Wolfish*, 441 U.S. 520, 535-40 (1979) (pre-trial detention is not punishment).

ess rights guaranteed by the Fifth and Sixth Amendments to the Constitution. *Id.* at 238.

In *Almeida-Sanchez*, 413 U.S. 266, the Court assumed, without deciding, that a Mexican alien in this country on a work permit had the full panoply of Fourth Amendment protections, and proceeded to declare an Act of Congress unconstitutional because of a violation of his Fourth Amendment rights. *Id.* at 273.[81]

The language in *Wong Wing* and *Almeida-Sanchez* has been consistently followed[82] by the Court, and was implicitly reaffirmed by this Court's recent decision in *INS* v. *Lopez-Mendoza*, ___ U.S. ___ (1984), 35 Crim. L. Rep. (BNA) 3310. *Lopez-Mendoza* involved two Mexican nationals who were seized by immigration authorities and held for deportation. The aliens challenged their seizure, claiming that it violated their Fourth Amendment rights. The Ninth Circuit Court of Appeals ruled that both had been seized in violation of their Fourth Amendment rights, and as to Sandoval, held that information obtained as a result of his seizure should be suppressed. This Court reversed the Ninth Circuit's ruling suppressing the evidence and held that the exclusionary rule of the Fourth Amendment does not apply to immigration proceedings:

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[81] *See United States* v. *Villamonte-Marquez*, ___ U.S. ___ (1983), 33 Crim. L. Rep. (BNA) 3173, 3175-76.

[82] *Cf. Carlson* v. *Landon*, 342 U.S. 524, 537, 544-45 (1952) (the Eighth Amendment's guarantee of reasonable bail in criminal proceedings is inapplicable in the context of deportation hearings, which are civil in nature.)

In *Plasencia*, 459 U.S. 21, although Plasencia had allegedly committed a crime in the process of attempting to enter the United States, she was apparently never arrested or charged with a crime. Instead, she was treated as "excludable" under the applicable immigration statute and regulations. Thus, the proceedings against her that eventuated in this Court were civil in nature and the question of what rights she may have had as a criminal defendant never arose.

> A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, ...
>
> * * *
>
> A deportation hearing is held before an immigration judge. The judge's sole power is to order deportation; the judge cannot adjudicate guilt or punish the respondent for any crime related to unlawful entry into or presence in this country. Consistent with the civil nature of the proceeding various protections that apply in the context of a criminal trial do not apply in a deportation hearing.

Id. at 3312.

In so ruling, the Court again assumed without deciding that the Mexican aliens involved had the same Fourth Amendment rights as citizens:

> We do not condone any violations of the Fourth Amendment that may have occurred in the arrests of respondents Lopez or Sandoval. . . . Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.[83]

Id. at 3316.

Therefore, petitioner's contention to the contrary notwithstanding, under the facts of this case, aliens must be given equal Fourth Amendment protection.[84]

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[83] Determining the scope of Ms. de Hernandez' Fourth Amendment rights would be complicated considerably in the present case if evidence of drug smuggling activity had been discovered by immigration officers during the course of her examination and inspection pursuant to routine immigration procedures. If that had been the case, this Court would be faced with the prospect of attempting to unravel the difficult question of whether the immigration officers had been acting primarily for immigration purposes, or pursuant to a criminal investigation. *Cf. United States* v. *Gouveia*, ___ U.S. ___ (1984), 35 Crim.L.Rep. (BNA) 3091; *Michigan* v. *Clifford*, ___ U.S. ___ (1984), 34 Crim.L.Rep. (BNA) 3007. Fortunately, that issue is not before the Court in this case.

[84] A decision by this Court that aliens are entitled to fewer rights than citizens in criminal proceedings would be met with considerable interest in

E. If Approved, The Police Procedure Employed Here Would Have A Disproportionate Impact Upon Innocent Travelers

Because aliens and citizens must be given equal Fourth Amendment protection under the facts of this case, this Court's *imprimatur* on the kind of procedures employed in the case at bar would have serious consequences for all international travelers—not just alien drug smugglers. It is important to note that the law enforcement agency involved here is the United States Customs Service; not the Immigration and Naturalization Service. Ms. de Hernandez had successfully passed through the immigration checkpoint at the time she first encountered the customs inspector. At the immigration checkpoint, her visa and travel documents were found to be in order and her passport was stamped "admitted."[85] She then proceeded to a customs inspection area where she stood in line, presumably with American citizens also awaiting customs inspection and clearance. The rule the Court fashions today as "reasonable" will apply

> . . . not only to poor and illiterate foreigners, but also . . . to everyone crossing the border, including United States citizens returning to this country.[86]

Vega-Barvo, 729 F.2d at 1351 (dissenting opinion).

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the foreign capitals of the world as well as within our own Department of State. Americans are aliens when they travel abroad, and it is not inconceivable that those countries whose citizens receive harsh treatment at the hands of our criminal justice system would reciprocate.

[85] See page 1, *supra*.

[86] Petitioner may respond that since the airport drug courier profile specifies that the characteristics of a drug smuggler include having no friends or family in the United States and speaking no English, the chances of American citizens becoming enmeshed in the procedures employed here are remote. There are two answers to such a response:

First, if criminals are as clever and cunning as petitioner gives them credit for being, they will quickly realize that aliens are prime suspects for body cavity or x-ray searches under the airport drug courier profiles currently in use. It will not be long before the kingpins of the international drug trade

The impact of the proposed police procedure upon innocent persons should be weighed in the balance of "reasonableness." This Court's decision will affect the thousands of people who cross our borders every day.[87] Moreover, the available statistics indicate that law enforcement officers at the border sweep the innocent in with the guilty for highly intrusive strip and body cavity searches with considerable regularity.[88]

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begin recruiting unfortunate Americans who are desperate for money to serve as their mules. *See, e.g., Blackford*, 247 F.2d 745. The airport drug courier profiles would then presumably be altered to reflect this "new trend."

Second, petitioner's response fails to consider the many innocent aliens who may be subject to the same treatment Ms. de Hernandez received. Although these persons are not citizens, the vast majority of them do not carry drugs, and they come to our shores believing that this country has a judicial system second to none in its concern for common decency and in its respect for the rights of the individual. Moreover, once they are here, aliens have the same fundamental Fourth Amendment rights as United States citizens. (*See* pages 31-36, *supra*.).

[87] "Along [the Mexican-American border alone] there were 152 million legal entries at authorized ports of entry during fiscal 1972, of which 91 million were made by aliens." *United States* v. *Ortiz*, 422 U.S. 891, 905 (1975) (App., concurring opinion, Burger, C.J.).

"We can . . . take judicial notice that many thousands of women crossed the border during the same period, and that the vast majority were not carrying narcotics in their body cavities or elsewhere." *Henderson* v. *United States*, 390 F.2d 805, 808 (9th Cir. 1967).

[88] ". . . between February and September, 1968, customs officials at Calexico conducted 331 strip searches of which only 96 [29%] led to the recovery of contraband." *Guadalupe-Garza*, 421 F.2d at 879 n.2.

"In *Henderson* [390 F.2d 805] we said: 'On the other hand the record does not show how many women who crossed the border during the same time were subjected to similar searches as a result of which nothing was found.' In this case we do have such information. Dr. Salerno testified that he had examined the body cavities of some 300 persons during the year before the trial, and had found narcotics in 15 to 20 percent of them. As we said in *Henderson*, the other 80 to 85 percent 'are certainly entitled to their dignity and privacy; their interests, too, are to be weighed.'" *Morales* v. *United States*, 406 F.2d 1298, 1300 n.2 (9th Cir. 1969).

The frequency with which the particular law enforcement procedure at issue is likely to invade the dignity and privacy of innocent persons is highly relevant to its reasonableness. *Brignoni-Ponce*, 422 U.S. at 883-84.[89]

F. The Level Of Articulable Suspicion Possessed By The Customs Officers In This Case Would Not Have Justified A Lengthy Detention Under The Standard Employed By Any Circuit Court Of Appeals[90]

In assessing the reasonableness of the detention in this case, it is instructive to compare the level of suspicion possessed by the customs officers with the articulable suspicion present in comparable Fifth and Eleventh Circuit cases which have upheld x-ray searches or lengthy detentions based upon the "flexible" reasonable suspicion standard employed in those circuits:

1. *Vega-Barvo*, 729 F.2d at 1343, 1350 (11th Cir.) (manifest inconsistencies in explanation of purpose of trip, no business

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[89] Mr. Justice Bradley, responding long ago to the argument that general warrants were of "utility" as "a means of detecting offenders by discovering evidence," stated:

> . . . our law has provided no [general warrants] to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say."

Boyd v. *United States*, 116 U.S. at 629 (1886). (Bradley J., quoting Lord Camden).

[90] Petitioner states:

"In neither court below did respondent dispute that the facts known to the Customs officers satisfied the reasonable suspicion standard." Br. for Pet. 38 n.31.

Petitioner is in error. The reporter's transcript of the suppression hearing in the district court reflects the following:

"MS. LEVINE: 'Your Honor, it's my position that there was no clear indication or probable cause *or any grounds* to hold Ms. de Hernandez when the strip search was negative. *I am not conceding there was cause for a strip search*, but, since nothing was found, it's not at issue.'" J.A. 34 (Emphasis added).

cards, extreme nervousness, pulsating carotid artery, suitcase contained "rags").

2. *Mosquera-Ramirez*, 729 F.2d at 1354-55 (11th Cir.) (lied about his occupation, could not answer some questions, gave inconclusive answers to other questions, had no credit cards, checks or letters of credit, and insufficient cash to accomplish the alleged purpose of his trip, was unable to explain the inconsistencies, could not give a definite itinerary for his stay, and when confronted with fact that passport showed he had traveled to Miami just two months before, "became very evasive and very nervous").

3. *Pino*, 729 F.2d at 1358 (11th Cir.) (claimed to be on business trip to buy television repair parts, yet was unable to name a single part to be purchased, "no business cards, manuals, forms or other business related accouterments," evasive, "did not know" answers to some questions, unusually nervous and disoriented throughout the inspection).

4. *United States* v. *Castaneda-Castaneda*, 729 F.2d 1360, 1362, 1363-64 (11th Cir. 1984) (extreme passivity, claimed to be a businessman but "ridiculous" answers to questions about occupation, travel documents incorrectly completed, nervousness, pulsating carotid artery, rough, red hands indicating manual labor in the face of claim of middle or upper-middle class life, airline ticket for New York in the face of claim of intention to vacation at Disneyworld).

5. *United States* v. *Henao-Castano*, 729 F.2d 1364, 1365-66 (11th Cir. 1984) (claimed that airplane ticket was purchased on May 10 for cash, when face of ticket revealed it was purchased May 25 on credit, claimed to own electronic parts store and to sell televisions, but had no business card, knew names of no stores he planned to visit, and could not answer, or answered incorrectly, even superficial questions about televisions).

6. *United States* v. *Padilla*, 729 F.2d 1367, 1368 (11th Cir. 1984) (claimed to be a businessman but no business cards or other identification, "incongruous," "wildly implausible" story

concerning purpose of visit: a plan to purchase three or four Xerox color photocopying machines with $971.00 cash, maintained that $971.00 enough to cover purchase, and related that machines would be transported back with him in a single piece of luggage, had no idea where such machines could be purchased, claimed to have hotel reservations at a particular hotel, which claim was shown to be false).

7. *United States* v. *De Montoya*, 729 F.2d 1369, 1370-71 (11th Cir. 1984) (lied about her conduct during the flight, claimed to have husband and children, but had no pictures of her family, claimed that husband an engineer but unable to say what kind of engineer, claimed that her suit was new, but unable to button it over bulging stomach, discrepancy between social status claimed and her appearance and poor quality personal effects).

8. *Mejia*, 720 F.2d at 1380 (5th Cir.) (airplane tickets contradicted declared itinerary, claimed to be a businessman on a buying trip, but not dressed as a businessman, no business suits in luggage, no business cards, hands calloused consistent with manual labor).

In the case at bar, none of the articulably suspicious behavior which supported an x-ray search or a lengthy detention in other reported cases was present. There was no evidence here of an inherently incredible story, no evidence of failure to answer questions, no evidence of evasive or nervous behavior, no evidence of lack of a definite itinerary, no admission to giving inaccurate information, or any of the other objective *indicia* of drug smuggling. There was no evidence of passport or visa tampering, no evidence of possession of anti-diarrhea medication or laxatives,[91] no evidence that Ms. de Hernandez' body movements were restricted or stiff,[92] no evidence of disorientation,[93] no evidence of recent drug use such as glazed or

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[91] *Compare Mendez-Jimenez*, 709 F.2d at 1302.

[92] *Compare United States* v. *Shreve*, 697 F.2d 873, 874 (9th Cir. 1983).

[93] *Compare Pino*, 729 F.2d at 1358.

dilated eyes, needle marks on the arms, or slurred speech,[94] no tip from a confidential informant indicating Ms. de Hernandez would be smuggling drugs into the country,[95] and no evidence from the Customs Bureau computer that Ms. de Hernandez had previously been involved in narcotics smuggling.[96] Instead of being unemployed with a large amount of cash, Ms. de Hernandez presented evidence of being employed, and the cash that she possessed was directly related to the stated purpose of her trip. As the Eleventh Circuit stated in *Vega-Barvo*, 729 F.2d at 1350:

> Since swallowers follow a different mode of operation, customs agents' suspicions will be aroused by different factors. For example, suspicion will not focus on bulky dress, . . . but on the traveler's inability to explain his or her trip.

Accord, *Mosquera-Ramirez*, 729 F.2d at 1354.

Unlike the aforementioned cases, there was nothing unusual in Ms. de Hernandez' papers, responses, conduct, demeanor, appearance or personal possessions which warranted even a reasonable suspicion. Not even the Fifth and Eleventh Circuits permit an x-ray search or a lengthy detention based upon an inarticulate hunch. In the instant case, there were simply no particularized facts which amounted to a reasonable suspicion that Ms. de Hernandez was internally smuggling narcotics. Furthermore, Inspector Serrato's statement that he and another inspector felt that Ms. de Hernandez "fit the profile" of a narcotics smuggler does not turn an inchoate hunch into reasonable suspicion.

> . . . what is significant for the reasonable suspicion standard is not the presence of generalized profile characteristics but articulable individualized suspicious behavior.[97]

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[94] *Compare Cameron*, 538 F.2d at 255.

[95] *Compare Couch*, 688 F.2d at 600.

[96] *Compare Aman*, 624 F.2d at 912.

[97] *Castaneda-Castaneda*, 729 F.2d at 1363; *accord*, *Mejia*, 720 F.2d at 1382; *Reid*, 448 U.S. at 440-41; *see Mendenhall*, 446 U.S. at 565 n.6 (concurring opinion of Powell, J.)

As the Ninth Circuit stated in its opinion below, ". . . thousands of unusual looking persons cross international borders daily on all sorts of errands, many of which are wholly innocent." Pet. App. 5a.

CONCLUSION

Vindicating the rights of a guilty criminal defendant is a troublesome proposition for any court at any time, the more so when the winds of popular opinion and Congressional will blow so strongly in another direction.[98]

Thirty-eight years ago, in a far-sighted and prescient[99] dissent in *United States* v. *Harris*, 331 U.S. 145, 156, 173 (1947), Mr. Justice Frankfurter expressed these thoughts:

> If only the fate of the [defendants] were involved, one might be brutally indifferent to the ways by which they get their deserts. But it is precisely because the appeal to the Fourth Amendment is so often made by dubious characters that its infringements call for alert and strenuous resistance.
>
> * * *
>
> It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and

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[98] *See, e.g.*, the Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473, 98 Stat. 1837, H.J. Res. 648 (Oct. 12, 1984).

[99] *Harris* was overruled by this Court in *Chimel* v. *California*, 395 U.S. 752, 768 (1968).

repression for society as a whole. The dangers are not fanciful. We too readily forget them.

For the reasons heretofore stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

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Constitutional Provisions

United States Constitution

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

19 U.S.C. § 482 authorizes customs officials to "stop, search, and examine . . . any vehicle, beast, or person, on which or whom . . . they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise. . . ."

19 U.S.C. § 1582 provides, in pertinent part, that "[t]he Secretary of the Treasury may prescribe regulations for the search of persons and baggage . . . ; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations."

Rules

Rule 5, Federal Rules of Criminal Procedure, provides in pertinent part, that "[a]n officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate . . ."

No. 84-755 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

In our opening brief we set forth the reasons for holding that the detention of respondent was lawful because the Customs officers had a reasonable suspicion, based on objective facts, that respondent was carrying narcotics within her digestive tract. Nothing in respondent's answering brief refutes our position.

1. Our principal argument (Br. 13-34) is that as a result of the government's compelling interest in protecting the integrity of the nation's borders, a relaxed standard of reasonableness applies in assessing border searches and detentions under the Fourth Amendment.[1] In order to

[1]Respondent attacks (Br. 16-17) our reference to a "relaxed reasonableness standard," but she appears to misunderstand our use of that phrase. We refer simply to the fact, not disputed by respondent (see Br. 10-14, 16-17), that the Fourth Amendment standard applicable to a search or seizure at the border is less stringent than the standard that would apply to ascertain the reasonableness of the same government activity occurring away from the border.

determine the quantum of suspicion necessary to justify a particular type of government action under this standard, the purpose of the search or detention must be weighed against its intrusion upon the suspect's legitimate expectations of privacy and liberty. Cf. *United States* v. *Sharpe,* No. 83-529 (Mar. 20, 1985), slip op. 10 (in assessing the propriety of a *Terry* stop, it is necessary "to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes" in addition to the duration of the stop). Since the purpose of the detention here was to intercept narcotics that otherwise would have been brought into the country and the intrusiveness of the detention was largely a function of respondent's own actions, a reasonable suspicion standard properly accommodates the interests of the government and respondent.

a. Respondent endorses this analytic approach, adopting what she characterizes as a Ninth Circuit rule that "evaluates the length of the detention in light of the purposes to which the law enforcement officers put the time during which the suspect is detained" (Br. 22). Respondent acknowledges (Br. 20-21 & n.47, 22, 23) that lengthy border detentions may be permissible under this test, but, citing this Court's decision in *Dunaway* v. *New York,* 442 U.S. 200 (1979), she asserts that the detention here was impermissible because its goal was to "produce incriminating evidence" (Br. 21-23).[2]

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[2]At another point in her brief, respondent suggests (Br. 17-20) that the detention in this case is unlawful because it does not qualify as a permissible stop under *Terry* v. *Ohio,* 392 U.S. 1 (1968), and its progeny. We agree that if the detention in this case had occurred within the United States it would not pass muster as a *Terry* stop, but we reject respondent's unsupported assertion that *Terry*'s limits apply to detentions at the border. Respondent acknowledges (Br. 10-11) that a search of luggage and the other elements of a routine border search are reasonable even if based upon a "subjective hunch." That is because the special considerations relating to searches at the border mandate the relaxation of the probable cause standard that otherwise would apply to such a search (U.S. Br. 14-16). These same considerations equally require relaxation of the standard that otherwise would govern more intrusive searches and detentions (see U.S. Br. 14-16, 22-24). Moreover, respondent's reliance upon *Terry* is contradicted by her approval (Br. 20-21 & n.47, 22-23) of border detentions that clearly exceed the scope of a permissible non-border *Terry* stop.

The flaw in respondent's argument is her failure to recognize that the purpose of the detention at issue in this case was not solely, or even principally, to obtain evidence for a criminal prosecution. Customs officers are authorized to search and detain persons at the border in order to detect "merchandise * * * imported contrary to law" (19 U.S.C. 482). This Court's decisions concerning the status of border searches under the Fourth Amendment have recognized that "broad powers [to conduct border searches] have been necessary to prevent smuggling and to prevent prohibited articles from entry." *United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123, 125 (1973); see also *United States* v. *Ramsey,* 431 U.S. 606, 619 (1977). Thus, respondent was not detained solely for investigatory purposes as was the suspect in *Dunaway*.[3] The Customs officers detained respondent because they reasonably believed that the detention was necessary to prevent the importation of drugs into this country. Indeed, the detention at issue in this case goes to the heart of the government's interest in maintaining the integrity of the borders.[4]

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[3]Respondent's reliance on *Dunaway* is misplaced for the additional reason that the Court in that case was concerned "with the events occurring during the detention" — the transportation of the defendant from a private dwelling to a police station and the custodial interrogation resulting in a confession. *United States* v. *Sharpe,* slip op. 8 & n.4. Respondent was not subjected to sustained interrogation of this type.

[4]Of course, as this case demonstrates, smugglers frequently are prosecuted if they are discovered. However, this does not detract from the

Customs officers can use reasonable investigative techniques to detect contraband carried in travelers' pockets and in their suitcases. The government is not required to admit alimentary canal smugglers such as respondent into the country, as respondent suggests (Br. 15), simply because they utilize a novel method to import their cargo. We submit that the government's interest in preventing the importation of illegal drugs is sufficiently compelling to justify the use of reasonable investigative techniques to detect these smugglers. Therefore, the Customs officers acted lawfully by detaining a reasonably suspected smuggler for the time required to examine her bodily wastes in order to determine whether she was carrying contraband.[5]

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fact that the principal purpose of Customs inspections is to prevent the importation of contraband.

In respondent's view, an extended border detention apparently is justified only if the purpose of the detention is to obtain a court order authorizing a search (Br. 22-23). This purpose cannot be more important than the government's interests in preventing the importation of contraband and detecting illegal activity, especially in view of the fact that neither a warrant nor any other type of court order is needed to effect a border search or detention (see U.S. Br. 15-16).

[5]Respondent nowhere sets forth the quantum of suspicion that she believes necessary to justify the detention of an alimentary canal smuggler, although her adoption of the Ninth Circuit's approach (Br. 23) indicates that she would apply the "clear indication" standard applied by the court below. However, this Court's decision in *Winston* v. *Lee*, No. 83-1334 (Mar. 20, 1985), slip op. 7-9, makes clear that the Ninth Circuit erred in concluding that "clear indication" refers to an intermediate standard between probable cause and reasonable suspicion. See also U.S. Br. 23-24 n.18.

Respondent intimates (Br. 14-16) that the test applied by the Ninth Circuit will not preclude the government from detaining suspected smugglers. However, in the very case cited by respondent, *United States* v. *Mendez-Jimenez*, 709 F.2d 1300 (9th Cir. 1983), the court distinguished a prior decision invalidating an X-ray search by noting, among other things, that the suspect in *Mendez-Jimenez* was found with an anti-diarrhea pill and there was evidence of passport tampering (*id.* at 1304). This evidence, of course, is not present in most alimentary canal smuggling cases (see U.S. Br. 39-41).

b. Respondent refers repeatedly (*e.g.*, Br. 17, 19, 20, 23, 26) to the length of her detention in arguing that the detention was unlawful. We do not deny that the detention was long, but respondent completely ignores the unanimous conclusion of the court below that respondent herself prolonged the detention by refusing food and drink in an "heroic effort[ ] to resist the usual calls of nature" (see Pet. App. 4a, 9a; see also U.S. Br. 27-28). A suspect cannot prolong his detention and then successfully challenge the detention because of its duration. In *United States* v. *Sharpe, supra,* this Court rejected the defendants' claims that their detention exceeded the permissible duration of a *Terry* stop, noting that "[t]he delay in this case was attributable almost entirely to the evasive actions of [defendant] Savage, who sought to elude the police * * *" (slip op. 12). The stop was not unreasonable, the Court concluded, because the police had acted diligently and the "suspect's actions [had] contribute[d] to the added delay about which he complains." Slip op. 12-13; see also *id.* at 9 (Marshall, J., concurring in the judgment) (a more lengthy detention can qualify as a valid *Terry* stop upon a "showing that [the] lengthier detention was not unduly *intrusive* for some reason; * * * for example, [if] the suspects, rather than the police, * * * have prolonged the stop") (emphasis in original; footnote omitted).

Sharpe makes clear that the intrusiveness of the detention in this case cannot properly be assessed simply by examining its duration. Of course, it is not possible to identify the portion of the detention that did not result from respondent's delaying tactics, and, in view of respondent's behavior, this burden should not be placed upon the government. We submit that a cooperative suspect who does not refrain from eating and drinking, and who ingests laxatives if needed to speed his body processes, would not be detained for an extended period of time. In many cases, the detention might

not exceed the period that travelers are detained for routine Customs inspections at congested airports. This Court therefore should uphold the detention of a suspected alimentary canal smuggler for the time required to examine his bodily wastes. Cf. *United States* v. *Sharpe*, slip op. 10 (in assessing a *Terry* stop, it is necessary to consider "the time reasonably needed to effectuate" the law enforcement purposes to be served by the stop).[6]

We stated in our opening brief (at 28-29) that the detention in this case was not improperly intrusive for the additional reason that respondent rejected the alternative of a more expeditious X-ray search. Respondent concedes (Br. 28-29 n.63) that "there is much to be said" for this reasoning if one assumes that an X-ray search is less intrusive than the detention. That precisely is our position: a suspect who refuses a less intrusive X-ray search cannot complain of the special intrusiveness of a lengthy detention.[7]

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[6]Respondent challenges this result because the detention has no finite duration (see Br. 24). However, respondent would uphold a detention for the time necessary to obtain a court order or search warrant (see Br. 22-23), despite the fact that such detentions have no inherent time limit and are not at all within the suspect's control. Moreover, a court could, of course, find that a detention was overly intrusive in an especially egregious case.

Respondent also asserts that this standard would leave too much to the discretion of Customs officers (Br. 24 & n.56). First, Customs officers' discretion is limited because the detention must be supported by reasonable suspicion. Moreover, as we discussed in our opening brief (at 26-29), the suspect, much more than the Customs officer, has control over the length of the detention because its duration depends only on the time that it takes for the suspect to move his bowels. Finally, the Customs officer's diligence is relevent in assessing the reasonableness of the detention. Cf. *United States* v. *Sharpe*, slip op. 11; *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 13.

[7]While we contend that either procedure is justified on the basis of a reasonable suspicion of alimentary canal smuggling, we believe that

The Court need not address this issue if it determines that the detention was reasonable in view of its purpose and respondent's responsibility for its duration. However, unlike respondent (Br. 29-31), we do not believe that this Court is barred from considering this issue because of the absence of information in the record concerning the health effects of X-rays. None of the courts of appeals that have addressed this issue has relied upon such evidence. *United States* v. *Vega-Barvo*, 729 F.2d 1341, 1349-1350 (11th Cir. 1984), cert. denied, No. 84-5553 (Dec. 10, 1984); *United States* v. *Mejia*, 720 F.2d 1378, 1382 (5th Cir. 1983); *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982). Similarly, this Court did not cite any medical evidence in upholding a routine blood test against a Fourth Amendment challenge in *Schmerber* v. *California*, 384 U.S. 757 (1966). Here, as in *Schmerber*, the "tests are a commonplace in these days of periodic physical examinations and experience with them teaches * * * that for most people the procedure involves virtually no risk, trauma, or pain" (384 U.S. at 771 (footnote omitted)). Thus, the Court is free to assess the X-ray issue and should conclude that respondent's decision to forgo the X-ray search substantially ameliorates the intrusiveness of the detention.[8]

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most persons would view the X-ray search as less intrusive. Respondent's analysis (Br. 28-29 n.63) of *United States* v. *Mosquera-Ramirez*, 729 F.2d 1352 (11th Cir. 1984), supports this view.

Respondent melodramatically characterizes (Br. 26) the X-ray option as "a dose of poison" because she claimed that she was pregnant. It is not easy to take this assertion seriously in the circumstances of this case. X-rays are not utilized unless medical personnel determine that they present no special danger to the individual; in this case, the medical personnel performed a pregnancy test and determined that respondent's claim was false (U.S. Br. 7; J.A. 64).

[8]This Court's decision in *Winston* v. *Lee*, *supra*, which reaffirmed *Schmerber*, does not alter the analysis of this issue. First, that case dealt with "surgical intrusions beneath the skin" to be performed under a general anesthetic (slip op. 7, 11). It therefore does not apply to the use

2. In our opening brief (at 34-37), we explained that respondent, as an alien seeking to enter the country, had a severely limited expectation of privacy and liberty at the border and that it was therefore lawful for the Customs officers to detain her on the basis of their reasonable suspicion that she was engaged in smuggling even if detention of a citizen on the same basis would have been impermissible. Respondent does not contest our showing that an alien has substantially reduced expectations of liberty and privacy when seeking to enter the United States. She asserts only (Br. 32) that this fact is not relevant in this case because an Immigration inspector already had admitted her into the United States.

Respondent is incorrect. The stamping of her visa by an Immigration officer did not effect her entry into this country within the meaning of the immigration laws. Entry into the United States does not occur until the alien's "physical presence is accompanied by freedom from official restraint." *United States* v. *Oscar,* 496 F.2d 492, 493 (9th Cir. 1974). In *Oscar,* the court held that two aliens "had not 'entered' the United States because they were never free from the official restraint of the customs officials at the San Ysidro Port of Entry." *Id.* at 493; see also *In re Dubbiosi,* 191 F. Supp. 65 (E.D. Va. 1961) (alien who had received a permit making him eligible to go ashore did not effect "entry" because he remained under official restraint); *In re Pierre,* 14 I. & N. Dec. 467, 468-469 (1973) ("[a]n 'entry' involves * * * freedom from restraint"). Since she had not yet entered the country, respondent remained subject to detention and examination under the immigration statutes

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of devices such as X-rays and magnetometers, which do not involve such an intrusion. Second, *Winston* did not involve a border search and therefore does not take account of the government's heightened interest in such procedures when they are necessary to prevent the importation of contraband.

and could not have had expectations of liberty and privacy greater than those recognized under the statutes.[9]

Moreover, whether or not respondent technically had been admitted to the country is not the determinative point in assessing her legitimate expectations of liberty and privacy while still at the border. The immigration statutes embody society's decision that aliens at the border cannot legitimately expect the same privacy and liberty as returning citizens. This determination remains relevant until the alien actually passes into the country free of government control.

Respondent also argues at length (Br. 32-36) concerning the equal protection rights of aliens. Although her point is not entirely clear, she appears to assert that any distinction in the Fourth Amendment rights of aliens and citizens at the border violates aliens' right to equal protection. Any such contention is frivolous. We have never disputed that respondent is entitled to the protection of the Fourth Amendment. However, the contours of that protection necessarily vary from the protections accorded to citizens because Congress has by statute differentiated between the privacy and liberty interests accorded to aliens and citizens at the border. That Congress has provided more stringent criteria conditioning aliens' rights to enter the country, or has required them to submit to medical examinations not required of citizens, or has directed the exclusion of aliens on the basis of facts or suspicions that do not justify exclusion of citizens is unquestionably a part of its legitimate powers to legislate on the subject of immigration, which by

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[9]We note as a point of information that the Attorney General is authorized to confer upon "any employee of the United States" the powers and duties of Immigration officers (8 U.S.C. 1103(a)). This authority frequently is utilized to empower Customs officers to exercise the powers of Immigration officers as well.

definition affects aliens but not citizens. The equal protection principle does not require differently situated people to be treated the same.

3. Finally, respondent argues (Br. 39-43) that even if the reasonable suspicion standard governs the permissibility of border detentions of suspected alimentary canal smugglers, the "articulably suspicious behavior" found to support such detentions in other cases was not present here. As we explained in our opening brief (at 37-43), this contention simply misperceives the state of the evidence, which, according to the court below, demonstrated that respondent "possessed almost all the indicators" used to identify alimentary canal smugglers (Pet. App. 3a n.3).[10]

Respondent's vague and implausible story, and the other indicia of smuggling present in this case, closely parallel the facts that courts of appeals have relied upon in concluding Customs officers had a reasonable suspicion of alimentary canal smuggling (see U.S. Br. 39-42). When these facts are combined with the unusual arrangement of respondent's undergarments it is clear that the Customs officers had

[10]Quoting her trial attorney's statement that "there was no clear indication or probable cause or any grounds to hold [respondent] when the strip search was negative," respondent maintains (Br. 39 n.90) that we err in asserting (Br. 38 n.31) that she had waived any claim that the evidence available to the Customs officers at the time of her detention failed to meet the reasonable suspicion standard. The sentence upon which respondent relies however, was merely a preface for her argument that "the facts in this case *do not justify a finding of probable cause for the detention, or even clear indication* for the X-ray search or the body cavity search that was ultimately performed" (J.A. 34-35 (emphasis added)). Respondent's attorney made no claim that the facts also were insufficient to satisfy the reasonable suspicion standard, as we believe she was required to do to preserve that contention for further review.

abundant grounds to suspect respondent of alimentary canal smuggling.[11]

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

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[11]Respondent directs (Br. 1-2 n.1) the Court's "particular attention" to Exhibit 102, the "book of invoices" carried by respondent. This "book" is a portfolio containing a hodgepodge of cash register tapes and other receipt forms, some bearing no name, some bearing respondent's name, and some bearing the name of a person other than respondent. This disorganized collection of receipts bears no resemblance to records that actually are used for business purposes and instead seems designed solely to create the appearance that their possessor is a business traveler. The invoices thus support rather than undermine the Custom officers' determination.

Respondent errs (Br. 4 & n.3) in asserting that the Customs officers did not initially apply for a court order because they believed the facts would not support such a request. Agent Windes testified (J.A. 22-23) that he erroneously believed that the policy of the Customs Service was not to apply for court orders authorizing X-ray searches.

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